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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

PARK VILLAGE APARTMENTS,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the second clause of the Overall Limitation provision of the standard form contract between Section 8 project owners and the United States Department of Housing and Urban Development entitles the project owners to contract rents that exceed prevailing market rents, and, if so, whether contract rents are permitted to exceed prevailing market rents by a fixed percentage amount or by a fixed dollar amount, and whether the prevailing market rents must be ascertained on the basis of rent paid for unassisted units that are, in all relevant aspects, like the assisted contract units.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, the United States Department of Housing and Urban Development was a party to the proceedings in the courts below.

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Park Village Apartments petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals in the *Park Village* case (App., *infra,* 1a-2a) is unreported. The opinion of the United States Court of Federal Claims in the *Park Village* case (App., *infra,* 3a-28a) is reported at 32 Fed. Cl. 441. A prior opinion in the United States Claims Court in the *Park Village* case (App., *infra,* 29a-41a), which decided the cross-motions for summary judgment, is reported at 25 Cl. Ct. 729. The opinion of the United States Court of Federal Claims, in the relevant *National Leased Housing Association* case (App., *infra,* 42a-78a) is reported at 32 Fed. Cl. 453. The opinion of the court of appeals reviewing the *National Leased Housing Association* case (App., *infra,* 79a-107a) is reported at 105 F.3d 1423.

JURISDICTION

Pursuant to the Tucker Act, 28 U.S.C. § 1419(a), the United States Court of Federal Claims had exclusive jurisdiction to hear claims against the United States based on any "express or implied contract with the United States." Pursuant to 28 U.S.C, §§ 1291 and 1295(a)(3), the United States Court of Appeals for the Federal Circuit had exclusive jurisdiction of an appeal from a final decision of the United States Court of Federal Claims. The judgment of the Court of Appeals was entered on March 11, 1998. The Court of Appeals denied a timely petition for rehearing on May 5, 1998. App., *infra,* 108a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Subsections (c)(1) and (c)(2)(A) of Section 8 of the United States Housing Act of 1937, as amended by Public Law 383, Title II, Sec. 201, the Housing and Community Development Act of 1974, and codified at 42 U.S.C. § 1437f(c)(1) and 42 U.S.C. § 1437f(c)(2)(A), respectively, are set forth in relevant part in the appendix at App., *infra,* 109a and App., *infra,* 110a, respectfully. 24 C.F.R. § 880.203(b) is set forth in the appendix at App., *infra,* 111a.

STATEMENT OF THE CASE

This case involves the second clause of the Overall Limitation provision of the standard form contract between Section 8 project owners and the United States Department of Housing and Urban Development ("HUD").[1] The second clause provides that in certain circumstances the Contract Rents shall exceed prevailing market rents of comparable unassisted units. Hereinafter, the second clause (in bold lettering below) will be referred to as the "proviso":

> "1.8d Overall Limitation. Notwithstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; **provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents."**

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[1] The entire Rent Adjustments section of the contract, section 1.8, is at App., *infra,* 4a-6a. Section 1.8d of the contract, the Overall Limitations provision, is at App., *infra,* 5a.

The Court of Appeals for the Federal Circuit affirmed the judgment and reported opinion of the United States Court of Federal Claims in *Park Village Apartments v. United States,* 32 Fed.Cl. 441, 444 (1994) *("Park Village II")* (App, *infra,* 3a-28a) in all respects. App., *infra,* 2a. Thus the Court of Appeals affirmed the following three interpretations of the Overall Limitation made by the Court of Federal Claims: (1) that owners whose formula-adjusted Contract Rents are less than prevailing market rents ascertained by comparability studies are *not* entitled to those prevailing market rents, but must accept up to 20% less (App., *infra,* 23a-28a); (2) that a study of rental trends, as a methodology, complies with the comparability standard of the proviso in ascertaining the rents of comparable unassisted units (App., *infra,* 15a-19a); and (3) that rental premiums, referred to in the proviso, are fixed dollar amounts even though the statute authorizes and the parties agreed to a percentage premium (App., *infra,* 19a-23a). Interpretations (1) and (2) are not consistent with the precedent set by this Court's interpretation of the Overall Limitation in *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) *("Alpine Ridge")*. Interpretation (3) was not raised in *Alpine Ridge.*

The Supreme Court in *Alpine Ridge* was aware that Section 8 Contract Rents paid to owners were permitted to exceed prevailing market rents, but the Supreme Court was not asked to consider the nature or application of the premium to which the proviso refers:

> "As required by the statute, this contract rent is, in turn, to be based upon 'the fair market rental' value of the dwelling, allowing for some modest increase over market rates to account for the additional expense of participating in the Section 8 program. See § 1437f(c)(1)." (*Alpine Ridge,* 508 U.S. at 12, 113 S.Ct. at 1900).

In *Sheridan Square Partnership v. United States,* 761 F.Supp. 738, 746 (D. Colo. 1991), the District Court held that in Section 8 HAP contracts between landlords and HUD, "the initial difference or premium between contract rates and market rates at the time the contract was signed is protected." In its successful brief on the merits on its petition for certiorari dated January 1993, that it filed with this Court to review the Ninth Circuit Court of Appeals' judgment in *Alpine Ridge Group v. Jack Kemp, Secretary of Housing and Urban Development,* 955 F.2d 1382 (9th Cir. 1992), HUD cited the above statement from *Sheridan Square Partnership, supra,* as supporting, correctly, the following proposition:

> "Section 8 project owners retain their rights to . . . rent adjustments that preserve the initial difference between the contract rent and market rates when the contract was signed." (App., *infra,* 122a-123a)).

HUD here acknowledged that the preservation of the initial difference (i.e., the premium) is an owner's contract *right.* In its brief in this appeal, HUD reversed itself and denied that the maintenance of the initial difference is an owner's contractual right.

The question presented requires the interpretation of the proviso and its effect on the three interpretations of the Overall Limitation made by the Court of Federal Claims and affirmed by the Court of Appeals.

A. Background.

In 1974 Congress amended the Housing Act of 1937 (the "statute") by adding the Section 8 rent subsidy program. 42 USC § 1437f(1974). This program provided for the construction and rehabilitation of millions of dwelling units by private owners who would then commit their dwelling units to long term housing contracts with HUD, agreeing to lease them to families or persons determined by HUD to be

of low-income, with HUD paying the difference of the Contract Rents not required to be paid by the tenants. HUD described the magnitude of its rent subsidy program as follows:

> "The Section 8 new construction and substantial rehabilitation program provides federally subsidized housing to millions of low-income tenants. It is one of the largest housing programs administered by the United States Department of Housing and Urban Development (HUD), with a total of approximately $115 billion in projected federal subsidies *due to project owners* under existing standard form long-term contracts (known as 'housing assistance payment contracts' or 'HAP contracts'). Approximately 18,000 such contracts are in effect nationwide, and all are subject to the statutory and implementing contractual language whose construction is the subject of this case." (HUD's Pet. for Cert. filed in this Court in March 1989, to review the judgment of the Ninth Circuit Court of Appeals in *Rainier View Associates v. U.S. Dept. of HUD,* 848 F.2d 988 (9th Cir. 1988)). (Emphasis added). (App., *infra,* 118a).

In 1976 Park Village Apartments ("Park Village") submitted to HUD a proposal to construct an 84 unit apartment complex in Oakland, California, designed for the elderly and handicapped. HUD approved the proposal, and on July 7, 1977, executed an *Agreement to Enter Into a Housing Assistance Payment Contract.* On May 24, 1978, the Housing Assistance Payment ("HAP") Contract (the "contract") was executed.

Park Village's inducement to enter the contract to provide housing to low income tenants was the statutory provision (42 USC § 1437f(c)(1)), which requires that each contract establish a "maximum monthly rent" to which the owner is *"entitled"*, and that the "maximum monthly rent" could

exceed market rents by up to 20%. App, *infra,* 109a. Park Village's initial Contract Rent, i.e., "maximum monthly rent," was set 15% above market rents of comparable unassisted units.[2] The statute further provides (42 U.S.C. § 1437f(c)(2)(A)) that adjustments shall perpetuate the "maximum monthly rents," which inexorably perpetuates the premium because the premium is integrated with the "maximum monthly rent." App, *infra,* 110a.

The statute, 42 U.S.C. § 1437f(c)(2)(A), requires that the "maximum monthly rents" shall be adjusted annually to "reflect changes in the fair market rentals." App., *infra,* 110a. The contract at section 1.8b(2), provides for *changes* "upward or downward" of the Contract Rents to effect that statutory mandate. App., *infra,* 5a. The Supreme Court in *Alpine Ridge,* 508 U.S. at 15, 113 S.Ct at 1901, observed that the statute provides "two alternative approaches" for adjusting the "maximum monthly rents," either a "market survey" or "a reasonable formula." The reasonable formula, when suspected of errant adjustments, is superseded by the market survey approach:

> "The rent adjustments indicated by the automatic adjustment factors remain the presumptive adjustment called for under the contract. It is only in those presumably exceptional cases where the Secretary has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue." (*Alpine Ridge,* 508 U.S. at 19, 113 S.Ct at 1904).

On May 24, 1979, the first anniversary date of the contract, and on successive anniversary dates until 1985,

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[2]The trial court in *Park Village II,* made the following finding of fact: "This testimony is sufficient to establish that HUD based plaintiff's $285 initial contract rent on a 15 percent upward adjustment to comparable rents." *App, infra,* 22a.

HUD adjusted Park Village's Contract Rents using formula-based adjustments. In June, 1985, HUD informed Park Village it was not granting the formula adjustment pursuant to section 1.8b of the contract because HUD suspected that the formula adjustment would cause the Contract Rents to exceed market rents. Relying on the contract's Overall Limitation, HUD required Park Village to submit a comparability study justifying a rent increase. Park Village complied. Its study revealed that even if HUD granted the rent increase based on the formula adjustment, Park Village's Contract Rent would still be less than the rent it was entitled to under the proviso. HUD did not dispute the procedure or the accuracy of Park Village's study, but held that rents ascertained by comparability studies do not permit increases in Contract Rents that have been under-adjusted by the formula method; HUD held that a comparability study acts only to reduce Contract Rents that have been overadjusted by the formula method. App., *infra,* 6a-7a. HUD's position is explained as follows by the Court of Federal Claims in *Park Village II* (App., *infra,* 6a):

> "In denying plaintiff's appeal, HUD took the position that comparability studies conducted pursuant to the overall limitation can only be used as a basis for adjusting contract rents to an amount less than that which would result from application of the AAAFs [i.e., the annual automatic adjustment factor pursuant to section 1.8b of the contract], and not for increasing contract rents to an amount above the AAAF level."

B. The Proceedings Below.

Park Village disagreed with HUD, and, asserting its right to increased Contract Rents based upon a market survey augmented by the premium required by the proviso, filed suit on December 8, 1988. App., *infra,* 6a-7a. On April 14,

1992, the Court of Claims decided HUD's motion for summary judgment and Park Village's cross-motion for partial summary judgment in a reported opinion (App, *infra,* 29a-41a). In the summary judgment proceedings, Park Village asserted the following three claims: (1) that the Contract's Overall Limitation entitles Park Village to market rents ascertained by comparability studies; then, to adhere to the proviso, the market rents are augmented by the premium the parties agreed to when establishing the initial Contract Rents; (2) that the rental premium, referred to in the proviso, is applied as a fixed percentage of comparable rents because the parties agreed initially to a fixed percentage; (3) that breach of contract damages, if determined, should be awarded from the first occurrence of said breach.

On point one above, the trial court granted partial summary judgment in favor of Park Village, holding that the Overall Limitation provides that rents determined by comparability studies not only establish the upper limit for Contract Rents (protecting HUD), but, most importantly for Park Village, establish the lower limit, protecting owners. App., *infra,* 32a-33a. On point two, the court denied the parties' respective motions for summary judgment without prejudice to refiling. App., *infra,* 40a-41a. On point three, the court granted partial summary judgment to HUD, holding that Park Village could not recover damages incurred prior to 6 years before the date of filing suit. App., *infra,* 40a, 41a.

At the close of the summary judgment proceeding, the Court of Claims admonished the parties to administratively determine the rents actually paid for comparable unassisted units. The parties each conducted comparability studies. Park Village believed, based upon the court's admonishment, that the court would bind the parties to the rents of one of the two studies, with the initial premium augmenting

the rents of that study. *Both* of these studies established that the Contract Rents paid to Park Village each year from 1982 through 1990 were less than prevailing market rents. Park Village's study showed that its Contract Rents were also less than prevailing market rents from 1991 through 1993. (Compare the charts on App., *infra,* 17a and 28a). In spite of the results of both studies, the parties failed to settle, and trial to determine damages was set for February, 1994.

Because both studies showed that Contract Rents paid Park Village were less than comparable rents from 1982 through 1990, it was apparent that the "initial difference" or premium above comparable rents, required by the proviso, was not being preserved in each of those years.[3] Park Village, on appeal, argued that this alone constituted a breach of contract.

The trial focused on two issues: first, the methodologies of the parties' studies and which was more reliable; and second, whether the premium referred to in the proviso was, as HUD interpreted, a fixed dollar amount added to comparable rents, or, as interpreted by Park Village, a fixed percentage amount multiplying comparable rents, the procedure agreed to when the parties entered into the contract.

Regarding the appraisal reports, the court observed that the methodologies employed by the two appraisers were "different". App., *infra,* 16a. The trial court described HUD's methodology as a statistical analysis of the rental trends of "approximately 4,000" rental units, "without giving any consideration to the similarities to or differences

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[3] In its brief on the merits on its petition for certiorari with respect to the Ninth Circuit's judgment in *Alpine Ridge,* HUD, citing *Sheridan Square Partnership v. United States,* 761 F.Supp. 738, 746 (D. Colo. 1991), acknowledged that "*. . . Section 8 project owners retain their rights to . . . rent adjustments that preserve the initial difference between the contract rent and market rates when the contract was signed . . .*" (Emphasis added.). App., *infra,* 122a-123a.

from plaintiff's 84 units." App., *infra,* 16a. The trial court described the methodology of Park Village's appraiser as having ". . . selected 4-5 properties based on her 'impression' of their comparability to plaintiff's units," using the rents of these properties as the value of Park Village's units. App, *infra,* 17a. The trial court adopted the results of HUD's study. App., infra, 18a-19a. By adopting HUD's study, the trial court adopted a methodology which calculated rental trends rather than rents paid for specific unassisted units that were comparable to Park Village's assisted units.

On appeal, Park Village argued that HUD's use of trends does not comply with the *comparability* standard required by the language of the contract's Overall Limitation, whereas Park Village's study did comply.

Regarding the second issue, at trial Park Village presented the uncontroverted testimony of William Szymzcak, former director of Housing Production for HUD's Region IX (which included California), that, when the initial Contract Rents were set, all owners in Region IX, without exception, received market rents increased by 15%, the premium or "difference" referred to in the proviso.

Q: **Is that monthly rental broken down in any way, form or manner?**

A: **No.**

Q: **And do you have any recollection at this point in time whether that contract would have included a specific special adjustment or differencial? . . .**

A: **I don't recall in this specific case whether it included adjustment.**

By Mr. Pedder:

Q: **But was it again the custom and practice of HUD, at this point in time, for section 8 elderly housing to award the special adjustment in differential?**

A: **Yes.**

Q: **And was it uniformly awarded?**

A: **To my recollection, it was uniformly awarded.**

Q: **Are you aware of any situations during this time period where this differential of 15-percent that you testified to was not given to any particular project?**

A: **No. I don't recollect an exception.**

Q: **Do you have any recollection as to whether those percentages reflected in the special adjustments were ever converted to some type of dollar amount any any point in time?**

A: **No.**

Q: **You're not aware of that?**

A: **I'm not aware of any case.**

The Court: **You're talking about you don't remember with respect to this particular or —**

The Witness: **No, I'm saying that in general. I have no recollection with respect to this specific case at all but in general I don't remember, you know, conversions to specific dollar amounts.**

The Court: **We have to end up with a contract rent. Isn't [that] what all these percentages are about is a contract rent?**

The Witness: **Yes, and you would take — You do that simply by multiplying the comparable market rent unassisted by 115-percent.**

(RT, p. 209, line 12 through p. 211, line 2).

Joseph Malloy, HUD's witness, also testified that Section 8 Contract Rents could be up to "115 percent, or 15 percent higher than the rent derived by market comparison." (RT, p. 384, lines 13-14). Mr. Malloy also testified that this was and "is done for every FHA market rent project in the country." (RT, p. 387, lines 1–19).

In spite of the trial court's finding based on Mr. Szymzcak's testimony,[4] the trial court interpreted the initial difference in the proviso as a fixed dollar difference, rather than the fixed percentage difference agreed to by the parties when they entered into the contract. App., *infra,* 23a. The trial court stated that the reasons for its decision on this issue are contained in its opinion in another case it decided the same day, *National Leased Housing Ass'n v. United States,* 32 Fed.Cl. 441, 467-471 (1994). App., *infra,* 69a-78a. See App., *infra,* 23a. Park Village was not a party in the *National Leased Housing Ass'n* case.

Upon appeal, the Court of Federal Claims' judgment in the *National Leased Housing Ass'n* case was affirmed in *National Leased Housing Ass'n v. United States,* 105 F.3d 1423, 1435, 1437 (Fed. Cir. 1997). App., *infra,* 103a. 107a. The plaintiffs-appellants in the *National Leased Housing Ass'n* appeal did not file a petition for a writ of certiorari with the Supreme Court. Thus the Court of Appeals' holding that the initial difference referred to in the proviso constituted a fixed dollar difference, not a fixed percentage difference, became binding precedent in the Federal Circuit.

Park Village argued on appeal that because the parties had agreed to set initial Contract Rents 15% above market rents, the proviso requires that whenever comparable rents

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[4] "This testimony is sufficient to establish that HUD based plaintiff's $285 initial contract rent on a 15 percent upward adjustment to comparable rents." App., *infra,* 22a.

are ascertained by market studies, the revised Contract Rents will be the product of these comparable rents multiplied by 115%. On appeal, Park Village demonstrated that by agreeing in the contract to formula rent adjustments, which have the inexorable effect of perpetuating the percentage difference agreed to initially, the parties showed that maintaining the agreed-upon percentage premium was their intent.

The Court of Appeals' holding in *National Leased Housing Ass'n* that the initial difference referred to in the proviso is a fixed dollar amount is subject to the doctrine of *stare decisis.* Therefore, Park Village, in both its appellate brief and its oral argument, properly requested an in banc hearing under the Court of Appeals' local rules in order for the Court of Appeals to overrule its holding on this issue in *National Leased Housing Ass'n.* Nonetheless, the Court's panel, at oral argument, stated that the panel's "hands were tied" under the doctrine of *stare decisis;* and the Court of Appeals' opinion, by its silence, presumably denied Park Village's request. If this Court grants certiorari, it must decide whether the Court of Appeals' holding on this issue in its *National Leased Housing Ass'n* decision should be overruled.

After adopting HUD's appraisal report, the trial court then added a fixed dollar amount of $37 (i.e, its interpretation of the proviso's premium), to each year's rent stated in HUD's report. (See the left-hand column in the court's chart at App., *infra,* 28a). As its chart shows, the court viewed those sums as a *gauge,*[5] to determine if a material difference existed under the first clause of the Overall Limitation, rather than viewing those sums as the lower limit on Contract Rents to which Park Village is entitled

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[5]See App., *infra,* 26a-28a, particularly the trial court's chart at App., *infra,* 28a.

pursuant to the proviso. The court concluded that Park Village must accept rents as low as 80% of the prevailing market rent rather than 15% more than the prevailing market rent as shown by Mr. Szymzak's testimony above and adopted by the court. (See footnote 2 herein). The court held that under the first clause of the Overall Limitation, the Contract Rents paid Park Village by HUD were not "materially different" (i.e., materially *less*) than rents the court adopted from HUD's study plus the initial difference of $37. As shown by the trial court's chart (at App., *infra,* 28a), because the Contract Rents paid to Park Village (shown in the right-hand column of the chart) were never less than 80% of the sum of the rents of HUD's study and $37 (shown in the left-hand column of the chart), the court held that Park Village was not entitled to damages for breach of contract. App., *infra,* 28a.

As shown below, on appeal Park Village argued that the trial court had failed to properly interpret the proviso and its effect, thus leading to its holding that Park Village was not entitled to the premium referred to in the proviso or to the full amount of market rents.

The opinion of the Court of Appeals (App., *infra,* 1a-2a) did not discuss any of the issues disputed in the trial court or the holdings of the trial court. But, as stated in footnote 6 below, the Court of Appeals made two misstatements of fact, one of which is extremely significant. App., *infra,* 1a-2a.[6]

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[6]The Court of Appeals' opinion has two errors of fact at App., *infra,* 1a. First, the parties entered into the HAP contract on May 24, 1978, not April 5, 1977. Second, the Court of Appeals' statement — "The contract provided that Park Village would receive a monthly payment initially set equal to the fair market rent for comparable properties" — is a serious error of fact, which the trial court did not find, nor did HUD assert. In fact (as Park Village stressed throughout its appellate briefs), Park Village's initial monthly Contract Rent was not "initially set equal"

REASONS FOR GRANTING CERTIORARI

By affirming the trial court's judgment and reported opinion, the Court of Appeals has decided important federal questions in a way that conflicts with the decision of this Court in *Alpine Ridge.* Also, by affirming the judgment and opinion of the trial court, the Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. This Court should grant certiorari for these reasons.

The trial court's opinion, affirmed on appeal and described above, involves three interpretations of the contract's Overall Limitation provision.

The first interpretation — that owners are *not* entitled to rents ascertained by comparability studies under the Overall Limitation — is inconsistent with this Court's holding in *Alpine Ridge.* Whereas this Court held that owners *do not* have a "contract right to unobstructed formula-based rent adjustments"[7], this Court also held that owners *do* have a right to Contract Rents "based on accurate and fair comparability studies"[8], when the Overall Limitation is invoked. The Court of Claims, however, held that Park Village does not have a contract right to rents ascertained by comparability studies. App., *infra,* 23a-28a.

The second interpretation — that rental trends, as a methodology, complies with the comparability standard of the Overall Limitation — is inconsistent with this Court's

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to the fair market rent of comparable properties, but was initially set 15% above the fair market rent of comparable properties. See the trial court's finding of this fact in footnote 2 herein. HUD did not disagree. In fact, HUD stated on page 12 of its appellate brief: "The trial court found that Park Village's initial contract rent exceeded reasonable rent by 15 percent."

[7] *Alpine Ridge,* 508 U.S. at 21, 113 S.Ct. at 1904-1905.

[8] *Alpine Ridge,* 508 U.S. at 20, 113 S. Ct. at 1904.

understanding in *Alpine Ridge,* 508 U.S. at 14, 113 S.Ct. at 1901, that market studies must focus on the element of likeness, not rental trends, when revising Contract Rents under the Overall Limitation.

The third interpretation — that the initial rental premium, referred to in the proviso, is to be treated as a fixed dollar amount added to comparable rents rather than as a fixed percentage amount multiplying comparable rents — was not considered by this court in *Alpine Ridge.*

Federal law controls when interpreting a government contract. *Saavedra v. Donovan,* 700 F.2d 496, 498 (9th Cir.), *cert. denied,* 464 U.S. 892, 104 S.Ct. 236, 78 L.Ed.2d 227 (1983). When, as here, a decision of a court below is based on an analysis of the contract language, the decision is reviewed de novo. *Miller v. Safeco Title Ins. Co.,* 758 F.2d 364, 367 (9th Cir. 1985).

The trial court's first two interpretations of the contract's Overall Limitation conflict with the important decision of this Court in *Alpine Ridge.* Indeed, as shown below, the trial court supported its first interpretation by misinterpreting this Court's opinion in *Alpine Ridge.* The third interpretation involves the federal question of whether the initial premium (or "difference") referred to in the proviso is to be treated as a fixed dollar amount or a fixed percentage amount. This question has come up, and will continue to come up, every time a Section 8 owner's Contract Rents are adjusted by means of a comparability study pursuant to section 1.8d of the standard form HAP contract. It is thus an important question of federal law that has not been, but should be, settled by this Court.

Indeed, in order properly to deal with the trial court's first two interpretations of the Overall Limitation, this Court must interpret the proviso's meaning and its effect on the first clause of the Overall Limitation. This Court, in its

important decision in *Alpine Ridge,* interpreted the first clause of the Overall Limitation, but said nothing about the second clause, the proviso. Granting certiorari will give this Court the opportunity to interpret the *entire* Overall Limitation, which is the most disputed provision of the HAP contract between HUD and Section 8 owners.

I

THE SUPREME COURT IN *ALPINE RIDGE* HELD THAT OWNERS ARE ENTITLED TO PREVAILING MARKET RENTS "BASED ON ACCURATE AND FAIR COMPARABILITY STUDIES."[9] THE COURT OF APPEALS, BY AFFIRMING THE JUDGMENT AND REASONING OF THE TRIAL COURT, HELD THAT OWNERS ARE NOT SO ENTITLED

Regarding the *first* interpretation, HUD petitioned this Court for a writ of certiorari on two occasions, both to reverse Ninth Circuit holdings that HUD is not permitted to substitute market studies under the Overall Limitation for formula adjustments under section 1.8b of the contract to limit or reduce Contract Rents shown to exceed rents paid for comparable unassisted units. Certiorari was denied with respect to *Rainier View v. U.S. Dept. of HUD* but was granted in *Alpine Ridge,* resulting in the Ninth Circuit's judgment being reversed. In both petitions, HUD argued that the Section 8 program *only* ensures landlords *prevailing market rents* as ascertained by comparability studies when the formula adjustments, which are based on rental trends, are suspected of causing the Contract Rents to exceed market rents. Unlike the plaintiff owners in *Rainier View* and *Alpine Ridge,* who claimed entitlement to formula-based rent adjustments, Park Village claims entitlement to

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[9] *Alpine Ridge,* 508 U.S. at 20, 113 S.Ct. at 1904.

"prevailing market rents"[10] ascertained by market studies, prevailing market rents being the centerpiece of HUD's petition for certiorari granted in this Court's decision in *Alpine Ridge*. In addition, as stated above, Park Village claims entitlement to the premium required by the proviso.

In its petition for certiorari with respect to *Rainier View*, HUD argued that the Section 8 program was "... designed to attract landlords by ***assuring*** them that ***they will receive the full market rents***...." (Emphasis added). App., *infra*, 118a. And in HUD's petition for certiorari and in HUD's brief on the merits on its petition for certiorari with respect to *Alpine Ridge*, the Solicitor General repeatedly acknowledged the owner's entitlement to prevailing market rents, stating:

> (1) that HUD "... makes 'assistance payments' to project owners ***to bring total rental income up to the prevailing market level***..." (HUD's brief on the merits on its Pet. for Cert. re *Alpine Ridge*, p. 3). (Emphasis added). (App., *infra*, 122a).
>
> (2) that "... Congress's enactment of Section 801 is constitutional. The statute is neither arbitrary nor irrational in light of Congress's purpose to respond to *Rainier View* by ***reinstating the market-rent approach of the Section 8 program***." (HUD's brief on the merits on its Pet. for Cert. re *Alpine Ridge*, p. 36). (Emphasis added). (App., *infra*, 123a);

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[10]The Reform Act "restores what Congress has always made clear is the basis of the program — prevailing market rents..." (HUD's Pet. for Cert. re *Alpine Ridge*, p. 21). App., *infra*, 121a. The Reform Act is Section 801 of the Department of Housing and Urban Development Reform Act of 1989, Pub. L. No. 101-235, 103 Stat. 2057 (codified at 42 U.S.C. § 1437f(c)(2)(C) (Supp. II 1990) and 42 U.S.C. note (Supp. II 1990).

(3) that the owners "... ***knowingly entered into a program that was designed simply to provide prevailing rents***" (HUD's Pet. for Cert. re *Alpine Ridge,* p. 19). (Emphasis added). (App., *infra,* 120a);

(4) that the Reform Act "... restores what Congress has always made clear is the basis of the program — ***prevailing market rents*** — and fine tunes the methodology for achieving the program's ends." (HUD's Pet. for Cert. re *Alpine Ridge,* p. 21). (Emphasis added). (App., *infra,* 121a).

"[T]he methodology for achieving the program's ends," i.e., "prevailing market rents," is clearly in reference to comparability studies, which is the mechanism that *"fine tunes"* errant formula adjustments, which rely on trends.

The trial court misused this Court's opinion in *Alpine Ridge* to justify its holding that Park Village is not entitled either to the initial premium or to the prevailing market rents, but, instead, must accept the rents based on formula adjustments even though those rents were less than prevailing market rents ascertained by both HUD's study and Park Village's study. In the course of reaching this conclusion, the trial court misinterpreted the "Rent Adjustments" section of the contract, section 1.8, as having "two goals." (App., *infra,* 25a-26a). To be sure, section 1.8 of the contract provides for the adjustment of the Contract Rents by one of two alternative methods. But the two methods of adjustment have only one goal, which is to maintain the "maximum monthly rents" required by the statute by reflecting the prevailing market rent. (App., *infra,* 109a, 120a). The trial court erroneously used this Court's statement in *Alpine Ridge,* 508 U.S. at 19, 113 S.Ct. at 1904, that "[t]he rent adjustments indicated by the [AAAFs] remain the presumptive adjustments called for under the [HAP] contract," to support its conclusion that owners must accept rents as low as 80% of the prevailing market

rents, if that is the result of the presumptive adjustment. App., *infra,* 25a. See App., *infra,* 23a-28a. Neither this Court's statement quoted above nor any other statement in this Court's opinion in *Alpine Ridge* supports or logically leads to the trial court's conclusion that owners must accept rents as low as 80% of the prevailing market rents. This Court, in *Alpine Ridge,* unlike the trial court, did not confuse adjustments with the "goal" to be achieved by adjustments. This Court's decision in Alpine Ridge is clear that when the "presumptive adjustments" fail to reflect prevailing market rents of comparable unassisted units, the Contract Rents shall be revised to the rents ascertained by comparability studies, under section 1.8d of the contract, which are deemed to reflect prevailing market rents. *Alpine Ridge,* 508 U.S. at 19, 113 S.Ct. at 1904.

Park Village argued on appeal that when "prevailing market rents" for comparable units have been ascertained by market studies, owners are not only entitled to those rents, but, in adherence to the terms of the proviso, the owners are also entitled to a premium to the extent a premium was agreed to initially, when the contract was entered into. The proviso trumps the first clause of the Overall Limitation, so that the premium shall not be construed as a "*material* difference." (Emphasis added). That the proviso trumps the first clause of the Overall Limitation is shown by the plain meaning of the first word of the proviso, "provided."[11] The word "provided" signals the drafter's intention that the provisions of the "provided" clause (i.e., the proviso) override conflicting provisions in the prior clause.

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[11] *Webster's New Collegiate Dictionary* (1977), G & C Merriam Co., p. 928, defines "provided" as a conjunction meaning "on condition that: with the understanding."

The trial court's reasoning failed to consider the proviso's mandate that certain differences "shall not" be prohibited. The court's focus on the first clause of the Overall Limitation obscured the overriding second clause (i.e., the proviso), which requires that payment of the premium be maintained above comparable rents, whether that premium is a fixed percentage amount or a fixed dollar amount.

The trial court's depriving Park Village of the premium is contrary to *National Leased Housing Assn. v. United States, supra,* 105 F.3d 1423 at 1435 (Fed. Cir. 1997), where the Federal Circuit Court of Appeals ruled, through a hypothetical, that the premium must be maintained:

> "Thus, if the original contract rent was $500 and the rent of a comparable unassisted unit was $400, **HUD is required to maintain a $100 difference between the adjusted rent and the rent of a comparable unassisted unit,** as determined by the comparability study." (Emphasis added). (App., *infra,* 102a).

II

RENTAL TRENDS DO NOT COMPLY WITH THE SUPREME COURT'S OBSERVATION IN *ALPINE RIDGE* THAT THE CRITERION FOR DETERMINING PREVAILING MARKET RENTS IS LIKENESS

The *second* interpretation of the trial court is also inconsistent with this Court's understanding in *Alpine Ridge,* as stated below, that market studies, when conducted, must focus on *likeness, not market trends,* in determining Contract Rents:

> "... HUD personnel would select between three and five other apartment buildings they considered *comparable* to the Section 8 building and compare their rents. The private market rents would then serve as an independent cap limiting the rent payments HUD would

make under the Section 8 contracts." (*Alpine Ridge,* 108 U.S. at 14, 113 S.Ct at 1901). (Emphasis added).

In its brief on the merits on its petition of certiorari with respect to *Alpine Ridge,* HUD described comparability studies as follows:

> "The comparability studies, in contrast, focus on three to five units *comparable* to a particular project in a relevant geographic area; they do not establish a rent level for a general area." (Emphasis added). (App., *infra,* 122a).

In HUD's petition for certiorari with respect to *Rainier View,* HUD relied on, and cited, testimony at a 1984 House subcommittee hearing which corroborates the understandings expressed above:

> ". . . a comparability study compares one assisted housing project with one to five individual housing projects that have similar unassisted units in the same local area. That is done because, for units to be truly comparable for rent-level purposes, they must be located in close proximity to each other (since even small distances between projects may vastly alter their rental value), *and must be as similar to each other in all other relevant aspects as possible.* See 1984 Hearing, *supra,* at 66-67." (Emphasis added). (App., *infra,* 118a-119a)

This Court, in *Alpine Ridge,* distinguished rental trends as the basis for formula adjustments, but not as the basis for comparability studies:

> "The Automatic Annual Adjustment Factors to which the contracts refer are developed by HUD **based upon market trends** recorded by the consumer Price Index and the Bureau of the Census Amerian Housing Surveys." (*Alpine Ridge,* 508 U.S. at 13-14, 113 S.Ct. at 1901. (Emphasis added).

Rents based upon market trends cannot reasonably be construed as complying with the Overall Limitation's comparability standard. A comparability study, described above, is the "alternative approach" or method to which an owner is contractually entitled when formula adjustments, which are "based upon market trends," prove neither "accurate" nor "fair." (*Alpine Ridge,* 508 U.S. at 13-14, 15, 18-19, 20, 113 S.Ct. at 1901, 1903, 1904.

III

BY AGREEING TO ALLOW FORMULA ADJUSTMENTS OF THE CONTRACT RENTS, THE PARTIES AGREED TO ADJUST THE PREMIUM, MAINTAINING THE PERCENTAGE AMOUNT AGREED TO INITIALLY

The *third* interpretation of the trial court, regarding the initial rental difference referred to in the proviso, was not addressed by this Court in *Alpine Ridge.* HUD did not petition this Court to consider how the proviso acts to modify market rents when the Overall Limitation is invoked and a market study determines the prevailing market rents. By authority of the statute (i.e, 42 U.S.C. § 1437f(c)(1)), the initial Contract Rents *could exceed* market rents by percentage premiums up to 20%. App., *infra,* 109a. HUD, in its petition for certiorari with respect to *Alpine Ridge,* referred to these percentage premiums as *exceptions* that are not relevant:

> "Under the statute, a maximum monthly rent is established for each dwelling unit, which (**subject to exceptions *not relevant here***) cannot exceed a "fair market rental[ ]." 42 U.S.C. 1437f(c)(1)." (Emphasis added). (App., *infra,* 120a)

HUD's statement is misleading. The "exceptions" HUD refers to *are relevant* when comparability studies are made

to determine Contract Rents pursuant to the Overall Limitation. These "exceptions" are the differences, referred to in the proviso, that shall not be prohibited, but must be allowed if they existed initially. Referring to the statute, but not the proviso, this Court was aware that Contract Rents *could exceed* market rents:

> "As required by the statute, this contract rent is, in turn, to be based upon 'the fair market rental' value of the dwelling, **allowing for some modest increase over market rates to account for the additional expense of participating in the Section 8 program.** See § 1437f (c)(1)." (*Alpine Ridge,* 508 U.S. at 12, 113 S.Ct. at 1900). (Emphasis added).

HUD and plaintiff-respondent Alpine Ridge Group had different reasons for *not* asking this court to rule on the interpretation and effect of the proviso. Alpine Ridge Group, asserting its entitlement to formula rental adjustments, insisted that HUD could not correct overpayment of Contract Rents by market studies, but must do so by correcting the formula adjustments. *Alpine Ridge,* 508 U.S. at 19, 113 S.Ct at 1903. In denying HUD's right to limit Contract Rents by market studies, Alpine Ridge Group chose to sacrifice its contractual entitlement to a "modest increase" under the proviso. As Alpine Ridge Group must have realized, it could not claim a right to the premium under the proviso at section 1.8d of the contract, while insisting on a right to unobstructed formula adjustments under section 1.8b. Alpine Ridge Group was hoping the Ninth Circuit's opinion and judgment would be affirmed, because the formula adjustments were more beneficial than the "modest increase" it was entitled to under the proviso.

HUD, by ignoring the proviso in its petition for a writ of certiorari, hoped for a decision that would limit its obligation simply to paying the rents indicated by market studies and not the "modest increase" over market rents required by the

proviso. HUD's hope was realized. The language of this Court in reversing the Ninth Circuit in *Alpine Ridge* makes no mention of the proviso or the premium, but limits HUD's obligation solely to paying market rents determined by studies:

> "The private market rents would then serve as an independent cap limiting the rent payments HUD would make under the Section 8 contracts." (*Alpine Ridge,* 508 U.S. at 14, 113 S.Ct. at 1901); and
>
> "[W]e find that those contracts do not prohibit the use of comparability studies to impose an independent cap on formula-based rent adjustments. . ." (*Alpine Ridge,* 508 U.S. at 17, 113 S.Ct. at 1903); and
>
> "Even if it could be demonstrated that HUD's studies have been unreliable, this would in no way suggest that the contract forbids HUD from capping rents based on accurate and fair comparability studies." (*Alpine Ridge,* 508 U.S. at 20, 113 S.Ct. at 1904).

In *Alpine Ridge,* 508 U.S. at 19, 113 S.Ct. at 1904, this Court ruled that the formula-based adjustments were the "presumptive adjustments" under the contract:

> "The rent adjustments indicated by the automatic adjustment factors remain the presumptive adjustment called for under the contract."

It is clear from this court's decision in *Alpine Ridge* that formula adjustments were presumed to be capable of adjusting the Contract Rents in accordance with the statute — i.e., 42 U.S.C. § 1437f(c)(2)(A) — to accurately reflect market rents. These formula adjustments are described in the contract at section 1.8b as the Automatic Annual Adjustment Factors ("AAAFs"). These factors are percentages. When applicable, the regulation (i.e., 24 C.F.R.

§ 888.203(b)),[12] requires Contract Rents to be adjusted by multiplying the current Contract Rents by these factors. Since the initial premium is an integral part of current Contract Rents being adjusted, the contract and this regulation are also mandating that the dollar amount of the initial premium be adjusted (i.e., changed) annually, thus contradicting the notion that the initial difference is a fixed dollar amount. Only by removing from the Contract Rents, before adjustment, the amount attributable to the initial premium, could the dollar amount of the initial difference be shielded from change. But, in accordance with section 1.8b of the contract and 24 C.F.R. § 888.203(b)), the amount attributable to the premium is not removed before the formula adjustment. Consequently, the dollar amount of the initial difference changes, inexorably, each year, thus refuting the Court of Appeals' holding in *National Leased Housing Ass'n v. United States, supra,* App., *infra,* 103a, that the initial difference is to be interpreted as a fixed dollar amount.

Simply put, by agreeing to allow the formula adjustments under section 1.8b of the contract, the parties also agreed, in effect, to adjust the dollar amount of the premium, which is an integral part of the current Contract Rents being adjusted. For this reason alone, the initial premium changes in dollar amounts, but its proportion to changing market rents, as agreed to initially, never changes. Consequently, the "difference" referred to in the proviso is maintained as a fixed percentage amount, not as a fixed dollar amount.

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[12] 24 C.F.R. § 888.203(b) provides:

"(b) The adjusted monthly amount of the Contract Rent of a dwelling unit shall be determined by multiplying the Contract Rent in effect on the anniversary date of the Contract by the applicable Automatic Annual Adjustment Factor (see paragraph (a) of this section) and rounding the result to the next higher whole dollar amount." App., *infra,* 110a.

Because neither HUD nor Alpine Ridge ever raised the issue of the "differences" referred to and required by the proviso to be maintained, this Court in *Alpine Ridge* had no occasion to rule on the proviso's meaning and effect in determining Contract Rents. For this reason, thousands of private owners still providing housing to millions of federally subsidized low-income tenants under Section 8 contracts,[13] have been, are being, and will be denied, as a matter of HUD's policy, hundreds of millions, if not billions, of dollars[14] in rental premiums, appropriated by Congress as

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[13]"The Section 8 new construction and substantial rehabilitation program provides federally subsidized housing to millions of low-income tenants". HUD's Pet. for Cert, re *Rainier View,* p. 4. (App., *infra,* 118a).

[14]Congress intended that owners be compensated for participating in the section 8 housing program, and as compensation, permitted Contract Rents to exceed prevailing market rents. The legislative intent is set forth in Senate Report No. 93-693, Housing and Community Development Act of 1974, and the House Conference Report No. 93-1114, June, 1974, and the joint statement of the House and Senate, which states in part:

> "The House amendment provided that maximum rents may exceed fair market rentals by up to 10 percent generally and by up to 20 percent where HUD determined that special circumstances warrant such increases..." (App., *infra,* 117a.)
>
> In accordance with the legislative intent, the statute provides:
>
> "The maximum monthly rent shall not exceed by more than 10 percentum the fair market rental established by the Secretary periodically but no less than annually for existing or newly constructed rental dwelling units... except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 percentum where the Secretary determines that special circumstances warrant such higher maximum rent..." (42 U.S.C. § 1437f(c)(1) (1974)). (App., *infra,* 109a.)

In its petition for certiorari in *Rainier View,* as quoted below, HUD describes the magnitude of the Section 8 rent subsidy program, stating that Congress budgeted 115 billion dollars in projected federal subsidies *due project owners,* and that approximately 18,000 Section 8 contracts

compensation for their participation in this massive program to " 'ai[d] low-income families in obtaining a decent place to live,' "[15] in privately owned dwellings rather than public housing projects.

CONCLUSION

In its opinion in *Alpine Ridge,* this Court's emphasis was on what HUD is entitled to do under the first clause of the Overall Limitation. But this Court did not make clear what an owner is entitled to receive under the second clause of the Overall Limitation.

If the judgment of the Court of Appeals stands, not only is HUD free to continue to take advantage of this Court's silence about the proviso in its opinion in *Alpine Ridge* by denying the premium to the owners; but HUD is also free to deny prevailing market rents to the owners.[16] The Court of

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were entered into. Simple arithmetic indicates that if only 10% of the 115 billion dollars appropriated was for premiums, owners would be entitled to 11.5 billion dollars in premiums. However, as the testimony showed, in Region IX HUD approved 15% premiums without exception, raising the amount of premiums to approximately 17 billion dollars, if that was done nationally — and there is no evidence that it was not.

"The Section 8 new construction and substantial rehabilitation program provides federally subsidized housing to millions of low-income tenants. It is one of the largest housing programs administered by the United States Department of Housing and Urban Development (HUD), with a total of approximately $115 billion in projected federal subsidies *due to project owners* under existing standard form long-term contracts (known as 'housing assistance payment contracts' or 'HAP contract'). Approximately 18,000 such contracts are in effect nationwide, and all are subject to the statute and implementing contractual language whose construction is the subject of this case." (HUD's Pet. for Cert. re *Rainier View,* p. 4). (Emphasis added). (App., *infra,* 118a).

[15] *Alpine Ridge,* 108 U.S. at 12, 113 S. Ct at 1900.

[16] It should be remembered that HUD, in its petition for a writ of certiorari with respect to *Rainier View,* stated that the Section 8

Claims' opinion, affirmed by the Court of Appeals, approved HUD's denial to Park Village of both the entire amount of the premium and a substantial amount of the prevailing market rent. In part, the Federal Court of Claims justified this result by asserting, erroneously, that this result is consistent with, and supported by, this Court's opinion in *Alpine Ridge.*

To prevent the continuing and unlawful withholding by HUD of these premiums, and of a substantial amount of the prevailing market rents, authorized and appropriated under the statute, and required by the contract, this Court should grant certiorari, and rule that owners are entitled to prevailing market rents of comparable unassisted units, ascertained by "accurate and fair" *comparability* studies (not by rental trend studies), and that those rents serve not as a cap or limit, but as a base rent, to which the premium, as required by the proviso, must be applied when revising the Contract Rents under the Overall Limitation. Furthermore, upon granting certiorari, this Court should hold that the premium

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program was "... designed to attract landlords by assuring them that they will receive the full market rents." (App., *infra,* 118a.)

required by the proviso is a fixed percentage amount, and not a fixed dollar amount.

July, 1998

Respectfully submitted,

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APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

95-5101

PARK VILLAGE APARTMENTS,
PLAINTIFF-APPELLANT.

v.

THE UNITED STATES,
DEFENDANT-APPELLEE.

DECIDED [AND ENTERED]: March 11, 1998

Before: MAYER, Chief Judge, RADER AND BRYSON, Circuit Judges.

Per Curiam.

On April 5, 1977, Park Village Apartments entered into a long-term Housing Assistance Payments Contract (HAP Contract) with HUD as part of the Section 8 subsidized housing program. The contract provided that Park Village would receive a monthly payment initially set equal to the fair market rent for comparable properties. The amount of the payment would subsequently be adjusted according to HUD's Automatic Annual Adjustment Factors (AAAF). However, the contract also provided that the adjusted rent would not materially differ from the market rent for comparable unassisted units. After a series of administrative disputes over the amount of the adjusted rent. Park Village

sued the United States for breach of contract in December, 1988. The United States Court of Federal Claims determined that Park Village was not entitled to damages for breach of contract. *See Park Village Apartments v. United State,* 32 Fed. Cl. 441, 454 (1994). Having considered the arguments presented by both parties in this case, this court *affirms* the judgment of the Court of Federal Claims for the reasons stated in its careful and well-reasoned opinion.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS.

No. 701-88C.

PARK VILLAGE APARTMENTS,
PLAINTIFF.

v.

THE UNITED STATES, DEFENDANT.

[FILED] Dec. 21, 1994.

OPINION

ANDEWELT, Judge.

I.

In this government contract action, plaintiff, Park Village Apartments, challenges the periodic rent adjustments granted by the United States Department of Housing and Urban Development (HUD) pursuant to Section 1.8 of a Housing Assistance Payments (HAP) contract plaintiff entered with HUD under Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437f (the Housing Act). In a prior opinion, *Park Village Apartments v. United States,* 25 Cl. Ct. 729 (1992) (*Park Village I*), this court interpreted Section 1.8(d) of the HAP contract, entitled "Overall Limitation," as requiring HUD to adjust the HAP contract rents so as to eliminate any material differences charged for comparable unassisted units. At the subsequent trial on the merits, the parties presented conflicting testimony as to the rents charged for comparable unas-

sisted units during the years in dispute[1] In its post-trial brief, defendant, *inter alia,* asks this court to reconsider its interpretation of Section 1.8(d) in *Park Village I.*

II.

Pursuant to its HAP contract with HUD, effective May 24, 1978, plaintiff constructed an 84-unit apartment building for the elderly and disabled. The HAP contract established an initial contract rent of $285 for each unit and HUD agreed to pay plaintiff the difference between the contract rent and the rent plaintiff received from its low-income tenants. Section 1.8 of the HAP contract provided for periodic adjustments to the contract rents, as follows:

1.8 *RENT ADJUSTMENTS*

a. *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section, up to the maximum amount authorized under Section 1.5a of this Contract.

b. *Automatic Annual Adjustments.*

(1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

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[1] Plaintiff originally disputed HUD's method of adjusting contract rents beginning in 1979, one year after the parties entered the contract. But in *Park Village I,* 25 Cl. Ct. at 734, this court concluded that plaintiff's claims involving rent adjustments made prior to 1982 are barred by the applicable statute of limitations.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner shall submit to the Government financial statements which clearly support the increase.

d. *Overall Limitation.* Not withstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

e. *Incorporation of Rent Adjustment.* Any adjustment in Contract Rents shall be incorporated into

Exhibit A by a dated addendum to the exhibit establishing the effective date of the adjustment.

Pursuant to Section 1.8(b), for each year up to 1986, HUD granted upward adjustments to plaintiff's contract rents based upon application of the Automatic Annual Adjustment Factors (AAAFs) which are described in 24 C.F.R. pt. 888. In 1986, however, HUD informed plaintiff that to justify any upward adjustment, plaintiff would have to conduct a comparability study to demonstrate that its contract rents did not materially exceed the rents charged for comparable unassisted units. Plaintiff prepared such a study which set comparable rents at between $547 and $584. In response to this study, HUD adjusted the contract rents by applying the applicable AAAFs, which resulted in a contract rent increase to $513.

Plaintiff appealed this 1986 adjustment within HUD and argued that pursuant to the overall limitation provision in the HAP contract, Section 1.8(d), HUD was obliged to rely upon the comparability data and to adjust the contract rents to an amount higher than the rent resulting from application of the AAAFs. In denying plaintiff's appeal, HUD took the position that comparability studies conducted pursuant to the overall limitation can only be used as a basis for adjusting contract rents to an amount less that which would result from application of the AAAFs, and not for increasing contract rents to an amount above the AAAF level. In other words, HUD took the position that the overall limitation serves only to create a ceiling and not a floor on contract rents. HUD informed plaintiff that the only way plaintiff could receive a rent increase above that resulting from application of the AAAFs would be to apply for a special adjustment under Section 1.8(c) and demonstrate a significant increase in operating costs. Plaintiff pursued a number of appeals regarding the 1986 and subsequent rent adjustments, but HUD's position did not change. Ultimately,

plaintiff filed the instant suit. In *Park Village I,* 25 Cl.Ct. at 731, this court rejected HUD's contract interpretation and held that the overall limitation creates both a ceiling and a floor on contract rent adjustments.

III.

A.

[1] Defendant asks this court to reconsider the court's interpretation of the overall limitation in *Park Village I* based upon the Supreme Court's discussion of the overall limitation in *Cisneros v. Alpine Ridge Group.* ____U.S. ____, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). Unlike the instant case, *Alpine Ridge* involved a situation where an upward rent adjustment based on the applicable AAAFs allegedly resulted in too high rather than too low a contract rent compared to the rents charged for comparable unassisted units. The plaintiff therein contended that its HAP contract obliged HUD to grant an upward rent adjustment based upon the applicable AAAFs regardless of the results of any comparability studies, but HUD responded that it could base the adjustment upon comparability studies instead.

This court addressed the identical issue raised in *Alpine Ridge* in *National Leased Housing Ass'n v. United States,* 22 Cl.Ct. 649, 658-59 (1991) *(NLHA I).* In *NLHA I,* this court disagreed with the Court of Appeals for the Ninth Circuit's interpretation of the overall limitation provision enunciated in *Rainier View Associates v. United States,* 848 F.2d 988 (9th Cir.1988), *cert. denied,* 490 U.S. 1066, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989), and concluded that HUD is not obliged to adjust HAP contract rents based upon the applicable AAAFs when comparability studies show that such an adjustment would result in contract rents that are materially higher than the rents charged for comparable unassisted units. In *Alpine Ridge,* the Supreme Court

employed essentially the same reasoning this court employed in *NLHA I* and also rejected the Ninth Circuit's interpretation of the overall limitation enunciated in *Rainier View*. The Supreme Court concluded that "we think that the contract language is plain that no project owner may claim entitlement to formula-based rent adjustments that materially exceed market rents for comparable units." *Alpine Ridge*, ____ U.S. at ____, 113 S.Ct. at 1904.

In seeking reconsideration of *Park Village I*, defendant relies upon the following statement in *Alpine Ridge*: "The rent adjustments indicated by the [AAAFs] remain the presumptive adjustment called for under the contract. It is only those presumably exceptional cases where the Secretary has reason to suspect that the adjustment factors are resulting in materially inflated rents that a comparability study would ensue." *Id.* But *Alpine Ridge* focused on "materially inflated rents" because the adjustments based upon the AAAFs in issue therein would result in rents that exceeded comparable rents. The Court in *Alpine Ridge* did not have before it and did not purport to address the instant situation, where application of the AAAFs would produce rents materially below comparable rents.

Moreover, although the Supreme Court did not purport to address the instant situation in *Alpine Ridge*, the Court's application and analysis of the overall limitation tends to support, rather than refute, this court's interpretation in *Park Village I*. In *Alpine Ridge*, the Supreme Court read the overall limitation provision in the HAP contract as implementing Section 8(c)(3)(C) of the Housing Act[2] and characterized Section 8(c)(2)(C) as follows:

> [T]he Housing Act ... provides that "[a]djustments in the maximum rents," whether based on market surveys or on a reasonable formula, "shall not result in

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[2]Section 8(c)(2)(C) of the Housing Act provides:

Adjustments in the maximum rents under subparagraphs (A) and (B) shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by the Secretary. In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged,and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factors cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability studies in order to establish rents that are not materially different from rents charged for comparable unassisted units. If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner. Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to November 7, 1988, shall be restored to the maximum monthly rent in effect on April 15, 1987. For any project which has had its maximum monthly rents reduced after April 14, 1987, the Secretary shall make

material differences" between Section 8 rents and the rents for comparable housing on the private market.

Alpine Ridge, ____ U.S. at ____, 113 S.Ct. at 1903. This court's interpretation of the overall limitation as applying to AAAF-based adjustments that would produce contract rents materially below comparable rents is consistent with the purpose behind Section 8(c)(2)(C) in that it assures that HUD will eliminate any material differences between Section 8 rents and rents charged for comparable unassisted units.

B.

Next, defendant argues that this court's interpretation of the overall limitation in *Park Village I* fails to give proper deference to HUD's own interpretation of the provision. Defendant argues that HUD derived the overall limitation in the HAP contract from a similarly worded HUD regulation and that this court must give deference to HUD's interpretation of its own regulations. *Santa Fe Engineers, Inc. v. United States,* 801 F.2d 379, 381 (Fed.Cir.1986); *Honeywell, Inc. v. United States,* 228 Ct.Cl. 591, 596, 661 F.2d 182, 186 (1981).[3] In any event, even if this court is obliged to grant a level of deference to HUD's interpretation of the overall limitation, this court should not defer to

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assistance payments (from amounts reserved for the original contract) to the owner of such project in an amount equal to the difference between the maximum monthly rents in effect on April 15, 1987, and the reduced maximum monthly rents, multiplied by the number of months that the reduced maximum monthly rents were in effect.

42 U.S.C. § 1437f(c)(2)(C).

[3] Ambiguous contract provisions typically are interpreted against the drafter of the contract, here HUD, rather than in the drafter's favor. *S.W. Aircraft, Inc. v. United States,* 213 Ct.Cl. 206, 213, 551 F.2d 1208, 1212 (1977).

HUD's interpretation because that interpretation is not reasonable.

The wording of the mandate in the overall limitation is absolute: "[A]djustments . . . shall not result in material differences between the rents charged for assisted and comparable unassisted units. . . ." The overall limitation admittedly does not specify what action HUD must take if AAAF-based adjustments would result in such material differences, *i.e.*, if HUD must simply refrain from granting the AAAF-based adjustment or, as a second alternative, must grant a different adjustment which would eliminate any material differences. As discussed in *Alpine Ridge* and *NLHA I*, where comparability studies indicate that application of the AAAFs would produce too high a rent, HUD has interpreted the overall limitation according to the second alternative and eliminated the material difference by granting the project owner an appropriate adjustment different than an AAAF-based adjustment. This court agrees with HUD's resort to this interpretation in such a case. The court disagrees, however, with HUD's selection of yet a third option when comparability studies indicate that the grant of an AAAF-based adjustment would result in contract rents that are materially below comparable rents. In such cases, HUD proposes simply to grant the full AAAF-based adjustment notwithstanding the resulting "material difference." The wording of the overall limitation, however, does not authorize HUD to honor the mandate against adjustments resulting in material differences when the mandate works to HUD's advantage and to ignore that mandate when the mandate works to HUD's disadvantage. The same obligation to modify adjustments so as to eliminate material differences applies whether comparable rents are materially higher or materially lower than AAAF-based rents.

Next, to support its position that HUD should be given discretion in applying the overall limitation provision, HUD

points to the "as determined by the Government" phrase in the overall limitation. Although that phrase admittedly grants HUD discretion, the determination to which this phrase refers relates to the determination of whether material differences exist between contract rents and rents charged for comparable unassisted units. Hence, the overall limitation grants HUD discretion in determining which units are comparable, what rents are charged for those comparable units, and whether AAAF-based adjustments would result in differences between assisted and comparable unassisted rents that are "material."[4] The overall limitation does not, however, grant HUD the discretion to refrain from taking any preventive action in the event HUD determines that an adjustment would result in a material difference. The overall limitation mandates that "adjustments . . . *shall not* result in material differences" (emphasis added), and HUD is obliged to comply with that mandate.

C.

Next, defendant argues that the court's interpretation of the overall limitation is inconsistent with HUD's mission to obtain quality housing for low-income tenants because HUD's mission does not include providing the owners of Section 8 projects with market rents. But HUD's ability to obtain quality housing is related to the amount of guarantee

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[4]Section 1.8(d) provides that "adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, *as determined by the Government*" (emphasis added). This grant of discretion to the government, of course, is not absolute and is not free from court review. "It is a well-established principle of law that a 'party vested with contractual discretion must exercise his discretion reasonably and may not do so arbitrarily or capriciously.' " *American Export Isbrandtsen Lines, Inc. v. United States,* 204 Ct.Cl. 424, 465, 499 F.2d 552, 576 (1974) (quoting *Pacific Far East Line, Inc. v. United States,* 184 Ct.Cl. 169, 184, 394 F.2d 990, 998 (1968)).

it is willing to provide to project owners. As this court explained in *National Leased Housing Ass'n v. United States,* 32 Fed.Cl. 454, 466 (1994) *(NLHA III)*:

> Interpreting the overall limitation and Section 8(c)(2)(C) as expressing an over-arching concern that Section 8 rents not be materially different from rents charged for comparable unassisted units would seem consistent with the parties' reasonable economic expectations when they entered the HAP contracts. If the project owners did not enter HAP contracts with HUD, they could expect to rent their units to tenants on the open market at rents approximating those charged for comparable unassisted units. Similarly, if HUD, without the benefit of the HAP contracts, tried to find apartments for low-income families, HUD could expect to pay approximately market rents. Therefore, interpreting the overall limitation provision to require adjustment of the contract rents in order to eliminate any material difference between the rents charged for assisted and comparable unassisted units would be generally consistent with the reasonable expectations of both HUD and the project owners as to the value of the rented units. HUD and the project owners would both be assured that contract rents would not stray too far from market rents. HUD could expect to pay and the project owners could expect to receive rents not materially different from the rents charged for comparable units on the open market.

Defendant argues that it is not necessary for HUD to guarantee Section 8 project owners rents that are not materially different from rents charged for comparable unassisted units because project owners with HAP contracts are insulated from certain market risks faced by owners of unas-

sisted units, including nonpayment of rent.[5] But the argument that rents charged for comparable unassisted units are too high a benchmark for contract rents in Section 8 units is inconsistent with HUD's procedures for setting contract rents. First, as explained *infra* pp. 450-51, when HUD established the initial contract rents upon entering the HAP contracts, pursuant to its regulations HUD typically set the rents at an amount higher rather than lower than the rents charged for comparable unassisted units. This was in apparent recognition that although entering HAP contracts provides project owners certain economic benefits, conducting business with HUD also entails certain significant economic costs. In addition, when HUD calculated the annual rent adjustments over the years, it did so by application of the AAAFs rather than relying on comparability studies, and the AAAFs are "geared to reflect trends in the local or regional housing market." *Alpine Ridge,* ____ U.S. at ____, 113 S.Ct. at 1904. Hence, HUD's consistent approach when establishing contract rents has been to use comparable rents as an appropriate benchmark.

Next, interpreting the overall limitation as addressing situations where the AAAFs produce below-market rents would not have the effect of guaranteeing market rents to project owners. Not all rent differences are addressed by the overall limitation, only "material" differences. As explained above, the phrase "as determined by the Government" grants HUD discretion in determining when a difference in

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[5]To support this contention, defendant cites to the following Federal Register statement:

> A landlord participating in the Section 8 program obtains compensating advantages in payment assurances provided for temporary vacancies, long-term commitments covering increases in costs, and reliability of housing assistance payments backed up by the commitment of the U.S. Government.

40 Fed.Reg. 18,682 (Apr. 29, 1975).

rents is "material." Applying that discretion in situations where AAAF-based adjustments produce above-market rents, HUD has determined that a material difference exists only where the contract rent would exceed comparable rents by 20 percent or more. *See infra* pp. 451-52. Although HUD has not recognized that the overall limitation also applies in situations where AAAF-based adjustments result in below-market rents, assuming that the overall limitation does apply in such situations as this court concluded in *Park Village I*, an analogous definition of material differences would be required. Assuming the same 20 percent threshold is employed where AAAF-based adjustments result in below-market rents, the overall limitation would be triggered only when the rents charged for comparable unassisted units are at least 20 percent higher than the AAAF-based contract rent. A guarantee that contract rents will not trail market rents by more than 20 percent is hardly an absolute guarantee that the project owners will receive market rents. Hence, under this court's interpretation of the overall limitation, rent adjustments based on the applicable AAAFs will remain the norm, and reliance on comparability studies will occur only in the extraordinary situation where application of the AAAFs results in rents materially different from market rents.

IV.

[2] The court's next task is to determine whether HUD breached its contractual obligation under the overall limitation when HUD granted the rent adjustments at issue in this case. In establishing the rents charged for comparable unassisted units at the time of these adjustments, the parties rely primarily upon the testimony of real estate appraisers. At trial, defendant offered the testimony of G. Michael Yovino-Young and plaintiff offered the testimony of Catherine Cordini.

Yovino-Young's methodology for determining rents charged for comparable unassisted units was as follows. Yovino-Young collected approximately 4000 entries on one-bedroom apartments during a 15-year period without giving any consideration to the similarities to or differences from plaintiff's 84 units. He used this large database to perform a statistical analysis of the overall trend in rental rates, which he later used as a "reality check" to verify the general correctness of his direct comparisons. Next, Yovino-Young analyzed the top 25 units each year with the highest rental rates to determine a trend for the increase in rates on the highest priced apartments over the 15-year period. From the approximate 4000 entries, Yovino-Young selected 38 units for direct comparison to plaintiff's units, used 3-4 units for each year of his study, and used each unit for no more than 4 years. Each of the units in Yovino-Young's study was an individual apartment that was available for rent in May or June of each year of the study, *i.e.*, a unit that actually was on the market at the time HUD adjusted plaintiff's contract rents.

Yovino-Young then made adjustments to the rents charged for these comparable units to account for differences between these units and plaintiff's 84 units. He made adjustments in nine categories: age (includes condition of the unit), size, amount of private outdoor space, parking facilities, dishwasher, pool or recreation facilities, utilities, location (both location of the apartment complex and location of the unit within the complex), and amenities for the elderly.

Plaintiff's expert, Cordini, used a different methodology for calculating comparable rents. Cordini compiled a list of approximately 40 apartment complexes by searching newspaper listings, examining government agency listings, and visiting different neighborhoods. She confined her list to those properties that were located in areas comparable to

the site of plaintiff's, which is a particularly favorable location for an apartment complex, and to those properties with 50-100 units (which is comparable to plaintiff's 84 units). Cordini eliminated from her list properties for which she could not obtain information and properties significantly older than plaintiff's, which narrowed her list to 10-15 properties. Cordini then selected 4-5 properties based on her "impression" of their comparability to plaintiff's units. She attempted to trace the rents of these properties through the years of her study, and substituted properties only where a significant change in the neighborhood of a property had occurred which would render the property incomparable.

Having selected the comparable units, Cordini, like Yovino-Young, adjusted for differences between the comparable units and plaintiff's units. Cordini, however, adjusted for only five variables: location, condition, size, "unit amenities," and amenities for the elderly. The difference between the comparable rents determined by Yovino-Young and Cordini are as follows:

Year	Yovino-Young's Conclusions	Cordini's Conclusions
1982	$400	$465
1983	$440	$485
1984	$520	$550
1985	$575	$640
1986	$600	$690
1987	$630	$735
1988	$675	$740
1989	$675	$745
1990	$680	$755
1991	$675	$775
1992	$700	$785
1993	$710	$785

This court initially was troubled by the significant differences in design of the two studies and the significant differences in the experts' respective conclusions. As explained by both experts, however, the appraisal business is only part "science" and in large part "art." An expert's "judgment" is often based to some extent on "impressions" which can be characterized as more "art" than "science." Here, each expert relied on his or her own expert judgment when selecting comparable units and adjusting the rents of these comparable units to account for differing conditions.

Plaintiff established that Yovino-Young made certain errors in adjusting for differing conditions such as mistakenly including adjustments for elevators where none existed in certain of the buildings containing alleged comparable units. Plaintiff also left the court somewhat concerned as to whether Yovino-Young had allowed too small an adjustment for differences in location between plaintiff's property and the alleged comparable units. But these and other discrepancies are comparatively minor and do not demonstrate a significant flaw in Yovino-Young's methodology, application, or results. As to evaluating location, the court is not convinced that Yovino-Young's comparability calculations were subject to any more criticism than Cordini's. Moreover, Yovino-Young's overall methodology had the advantage of including a back-up "reality check" and varying the comparable units over the years, which lessened the effect of any single error on the overall study results. Based on consideration of the testimony of these two experts and plaintiff's other witnesses who testified concerning comparable rents, the court concludes that Yovino-Young's comparability determinations are marginally more convincing and,

therefore, the court will adopt the results of Yovino-Young's study.[6]

V.

[3] The next dispute raised in the parties' post-trial briefs involves the proper interpretation of the proviso in the overall limitation in Section 1.8(d), which states: "provided, this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents." The parties dispute (1) the amount of the difference between the contract rent and the rents of charged for comparable unassisted units when HUD established the initial contract rent, and (2) whether in applying the overall limitation this initial difference should be carried forward as a fixed dollar amount or a fixed percentage.

A.

As to the amount of the initial difference, the HUD handbook in effect at the time the parties entered the instant HAP contract permitted HUD to grant special upward adjustments to comparable rents for Section 8 projects. That version of the handbook allowed the contract rent for elderly/handicapped units to be 15 percent greater than rents charged for comparable unassisted units. The potential 15 percent adjustment consisted of three separate 5 percent

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[6]Because the court finds Yovino-Young's calculations to be more convincing, the court need not address the issues raised in the parties' post-trial briefs as to whether HUD is entitled to deference in its determination as to comparable rents when HUD's determination of comparability is made for the first time in defending a law suit attacking the contract rents rather than at the time HUD determined which method of adjustment to employ.

adjustments. The first 5 percent adjustment was "to reflect the enhancement in rental values attributable to the special amenities and design features included in Elderly/Handicapped units." The second 5 percent adjustment was "to compensate for the additional burdens of managing an all subsidized rental housing project." The third 5 percent adjustment was to compensate under certain circumstances for the payment of mortgage discounts when HUD-insured financing was used or to compensate for the higher debt service payments generally associated with conventional mortgage loans when conventional mortgage loan financing is used.[7] The handbook permitted HUD to grant a contract rent greater than 15 percent above comparable

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[7]The HUD handbook in effect at the time the parties entered the contract provided, in pertinent part:

> i. *Special Adjustments.* The overall effect of the three adjustments described in subparagraphs (1), (2) and (3) below is to permit the approval of Contract Rents which exceed normal comparability . . . .
>
> (1) An upward adjustment of 5% shall be made to reflect the enhancement in rental values attributable to the special amenities and design features included in Elderly/Handicapped Units. Alternatively, in lieu of a 5% adjustment, the rent of Elderly/Handicapped Dwelling Units may be adjusted by the addition of the monthly amount of the debt service attributable to the inclusion of special amenities and design features for the elderly/handicapped . . . .
>
> (2) If 100% of the revenue-producing dwelling units of a Section 8 project are planned to be assisted, an upward adjustment of 5% shall be made to compensate for the additional burdens of managing an all subsidized rental housing project . . . .
>
> (3) An upward adjustment of 5% shall be made to compensate for the payment of mortgage discounts when HUD-insured financing is used or to compensate for the higher debt service payments that generally must be paid to obtain conventional mortgage loans when conventional mortgage loan financing is used . . . .

HUD Handbook 7420.1 CHI, ch. 9, at 9-13 to 9-14 (Nov. 1976).

rents if HUD determined the higher resulting rent to be reasonable. The pertinent section of that version of the handbook apparently was modified on May 28, 1978, four days after the parties entered the instant HAP contract. This modified version of the handbook retained the 15 percent adjustment but broke it down into a 10 percent adjustment for an all-assisted, HUD-insured project and a 5 percent adjustment to compensate for mortgage discounts or higher debt service.[8]

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[8]The May 1978 handbook provided, in pertinent part:

(9–3i) *Special Adjustments to the Comparable Rent*

(1) (i) The following adjustment is intended to compensate for the increased security services and higher costs of owning and maintaining assisted *family* housing, and for both the additional management costs and costs for additional amenities and design features, such as ramps and grab bars, which are required in units planned for *elderly/handicapped* occupancy.

* * * * * *

(b) For all assisted units in HUD-insured projects in which 100% of the revenue producing units are assisted, a 10% adjustment shall be made.

* * * * * *

(ii) The effect of the use of the appropriate adjustment in paragraph 9–3i(1)(i) is to permit both Contract Rents and rents used in processing a mortgage insurance application for a Section 8 assisted project to exceed normal comparability (as determined for an unsubsidized mortgage insurance application with no consideration of Section 8 assistance) by 5% or 10% as appropriate.

(2) An upward adjustment of 5% shall be made to compensate for the payment of mortgage discounts when HUD-insured financing is used or to compensate for the higher debt service payments that generally must be paid to obtain conventional mortgage loans when conventional mortgage loan financing is used [unless the conditions below in (i), (ii), and (iii) in the full text of the handbook are satisfied].

* * * * * *

HUD set plaintiff's initial contract rent at $285, but the parties disagree as to how many of the three potential 5 percent adjustments HUD granted to produce that $285 figure. The pertinent HUD documents have apparently been destroyed. Plaintiff contends that the $285 figure included all three 5 percent adjustments while defendant contends that, in the absence of the contemporaneous documents, plaintiff can only prove that it received the first two of these adjustments. The third 5 percent adjustment remains in dispute.

At trial, plaintiff presented the testimony of William E. Szymczak, who was the Director of Multi-Family Housing Development in HUD's San Francisco regional office at the time the parties entered the HAP contract. While Szymczak did not specifically recall approving plaintiff's contract, he did testify that it was the custom and practice of his office at the time to grant contractors in plaintiff's situation a full 15 percent upward adjustment based on the three 5 percent adjustments permitted in the HUD handbook. Szymczak did not recall a single exception. This testimony is sufficient to establish that HUD based plaintiff's $285 initial contract rent on a 15 percent upward adjustment to comparable rents. The amount of rent that would yield a $285 initial contract rent after a 15 percent increase is $248. Therefore, comparable rents at the time HUD established plaintiff's initial contract rent were $248 and the difference in dollars between comparable rents and the initial contract rent was $37.

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(3) The aggregate potential effect of the special adjustments in paragraphs 9-3i(1) and (2) on the rents is summarized graphically below. . . .

HUD Handbook 7420.1 CHG. ch. 9, at 9-13 to 9-14 (May 1978).

B.

Next, defendant contends that the phrase in the overall limitation proviso "to the extent that such differences may have existed with respect to the initial Contract Rents" refers to the $37 initial difference. As a result, according to defendant, in applying the overall limitation, the court is obliged to consider the $37 to be the "extent that such differences may have existed with respect to the initial Contract Rents." Plaintiff argues that the extent of the difference referred to in the proviso is not the dollar difference, but rather the percentage difference between the rents charged for comparable unassisted units and the initial contract rent. This court analyzed this same issue in *NLHA III*. Fed. Cl. at 467-71. For the reasons set forth therein, defendant is correct — the initial difference referred to in the proviso in the overall limitation is a fixed dollar amount, not a percentage factor.

VI.

[4, 5] The final issue the court must address is whether plaintiff is entitled to any breach of contract damages as a result of this court's findings and analysis above, including the court's findings as to the rents charged for comparable unassisted units. HUD would be in breach of its obligations under the overall limitation only if there is a "material difference[ ]" between the contract rents HUD established using the AAAFs and the rents charged on the open market for comparable unassisted units. Therefore, the court initially will determine whether the difference in these rents is "material."

As explained above, the phrase "as determined by the Government" in the overall limitation grants HUD the authority to determine whether application of the AAAFs would result in material differences between contract rents and rents charged for comparable unassisted units. This

discretion, however, is not absolute. A determination by HUD regarding the "material" nature of a difference in rents is vulnerable to attack in this court if HUD's determination is arbitrary and capricious. *See supra* note 4.

In 1986, HUD first defined "material differences" in the situation where a rent adjustment based on application of the AAAFs would result in a contract rent in excess of comparable rents. HUD took the position that "a material difference exists whenever the adjusted Section 8 rent would exceed 120 percent times the sum of the comparable rent and the initial difference." At the time, HUD was of the view that the overall limitation did not also reach the situation where a rent adjustment based on application of the AAAFs would result in a contract rent lower than comparable rents. Therefore, HUD did not similarly describe the standard that it would use to assess "material differences" in such situations. After this court concluded in *Park Village I* that the overall limitation applies in situations where AAAF-based contract rents would be lower than comparable rents. HUD took the position that a determination of "material differences" in such situations should be analyzed as the mirror image of HUD's material difference determination where AAAF-based rents would exceed comparable rents.

The court agrees that it is appropriate to employ the same basic analytical approach to detect "material differences" whether AAAF-based contract rents would be above or below comparable rents. As explained above, Section 1.8(d) of the HAP contract embodies the parties' agreement that in both of these situations contract rents will be permitted to stray from comparable rents only to a limited extent. Because the overall limitation uses the same language to cover both situations, it is appropriate to use the same analytic standard to assess "material differences" in both situations. Thus, in effect, when HUD established the standard for

assessing a material difference where the AAAF-based adjustment would result in too high a rent, HUD also dictated the standard it should apply when the AAAF-based adjustment would result in too low a rent. Hence, the task before this court is first to determine whether the standard HUD enunciated in 1986 to cover situations where AAAF-based contract rents would exceed comparable rents is sustainable. If it is, then the court will adopt that same analytic approach to determine whether "material differences" exist in this case where AAAF-based contract rents would be below comparable rents.

HUD's adoption of a 20 percent threshold (or a 120 percent factor) in situations where AAAF-based contract rents would exceed comparable rents admittedly allows for a fairly substantial difference in rents before that difference is held to be "material." For example, the difference between $500 and $600 is 20 percent, and this $100 difference is substantial from the perspectives of both the tenants and the project owners. Upon review, however, HUD's choice of this 20 percent threshold to assess "material differences" is not unreasonable and cannot be characterized as arbitrary and capricious.

Section 1.8 of the HAP contract is directed at accomplishing two goals that are potentially in tension. First, Section 1.8 embodies the parties' agreement that the AAAFs are generally determinative as to the amount of rent adjustments. As the Supreme Court explained in *Alpine Ridge,* "[t]he rent adjustments indicated by the [AAAFs] remain the presumptive adjustment called for under the [HAP] contract." *Alpine Ridge,* ____ U.S. at ____, 113 S.Ct. at 1904. Designating the AAAFs as the norm makes economic sense because it would be very costly for HUD to conduct periodic comparability studies on each individual Section 8 unit. Second, Section 1.8 also embodies the parties' agreement that there be some type of comparability

"check" on AAAF-based adjustments. As the Supreme Court explained in *Alpine Ridge,* comparability studies will come into play in those "exceptional cases" where the AAAFs do not reflect trends in local markets rents as they were intended to do. *Id.* The concept of comparability creates something of a safety net to assure that contract rents do not depart too dramatically from comparable rents.

In formulating its policy as to what constitutes material differences, HUD had to balance both of these concerns. If HUD had classified small percentage differences in rents as "material," then HUD would be required to base many more adjustments on comparability studies. As a result, HUD's costs would increase significantly and comparability would become an ordinary rather than extraordinary method for calculating Section 8 contract rents. On the other hand, if HUD had limited material differences to very high percentage differences, then the safety net would seldom save. HUD's selection of a 20 percent differential as the minimum threshold for materiality appears to represent a reasonable balance of the competing factors embodied in Section 1.8 of the HAP contracts and hence, a reasonable exercise of the discretion allowed HUD in Section 1.8(d). While this 20 percent threshold assures that the AAAFs ordinarily will control, it also brings comparability into issue where contract rents depart fairly substantially from comparable rents. In this regard, it should be stressed that HUD has an incentive to establish a reasonable threshold for material differences because the threshold can but both ways. A comparability check on the award of an AAAF-based adjustment helps project owners when the AAAF-based rents trail comparable rents, but helps HUD when the AAAF-based rents exceed comparable rents.

Because the court concludes that a symmetrical approach is appropriate, if the 20 percent differential is employed where AAAF-based contract rents would be too high, then

the mirror image approach should be employed where AAAF-based contract rents would be too low. In determining whether AAAF-based rents would be too high, HUD calculates the sum of the comparable rents and the initial difference and then determines whether AAAF-based rents are higher than 120 percent times that sum. If the AAAF-based rents are higher, then a material differences exists. HUD apparently decided to add the initial difference to the comparable rents before applying the 120 percent factor to adhere to the proviso in the overall limitation that "this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent such differences may have existed with respect to the initial Contract Rents."

Defendant contends that the mirror image approach to be applied where AAAF-based rents are too low should designate a difference as "material" only when the comparable rents exceed the AAAF-based rents by more than 20 percent. Defendant argues that it would be inappropriate to add the initial difference to the comparable rents prior to applying the 20 percent differential because the initial difference is already factored into the AAAF-based rents, which would be increased if they are "materially" low. It is not necessary, however, for this court to resolve this particular issue because even if the 20 percent factor is applied to the sum of the initial difference and the comparable rents in this case, plaintiff still would not be entitled to recover any damages. The following chart shows that during the years in issue, plaintiff always received contract rents within 20 percent of the sum of comparable rents and the initial difference.

Year	Yovino-Young's Conclusions Plus Initial Difference ($37)	Material Difference Threshold (-20%)	Actual Rents Paid By HUD
1982	$437	$350	$372
1983	477	382	425
1984	557	446	449
1985	612	490	494
1986	637	510	533
1987	667	534	564
1988	712	570	606
1989	712	570	631
1990	717	574	669
1991	712	570	698
1992	737	590	733
1993	747	598	767

Therefore, because plaintiff has failed to establish that "material differences" existed between contract rents received and the rents charged for comparable unassisted units, plaintiff is not entitled to any breach of contract damages.

CONCLUSION

For the reasons set forth above, defendant's motion for reconsideration of *Park Village I* is denied, and the Clerk of the Court shall dismiss plaintiff's complaint. No costs.

APPENDIX C

UNITED STATES CLAIMS COURT

No. 701-88C

PARK VILLAGE APARTMENTS,
PLAINTIFF,

v.

THE UNITED STATES,
DEFENDANT.

[Filed] April 14, 1992.

OPINION

ANDEWELT, Judge.

In this government contract action, plaintiff, Park Village Apartments, challenges the periodic rent adjustments made by the United States Department of Housing and Urban Development (HUD) pursuant to paragraph 1.8 of plaintiff's Housing Assistance Payments (HAP) contract. Pursuant to Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437f (Section 8), plaintiff constructed an 84-unit, federally assisted apartment building for the elderly and handicapped. Plaintiff's HAP contract, effective May 24, 1978, obliges plaintiff to lease all 84 apartment units to eligible tenants and obliges HUD to pay plaintiff the difference between the contract rent and the amount actually paid by the low-income tenants. The contract originally established a monthly contract rent of $285 for each unit and, pursuant to paragraph 1.8, HUD is required to adjust the contract rent on an annual basis.

In the instant complaint, plaintiff contends that HUD breached its HAP contract by failing, in a variety of ways, to adjust the contract rent in the manner required under

paragraph 1.8. This action is presently before the court on defendant's motion for summary judgment and plaintiff's cross-motion for partial summary judgment. Summary judgment is warranted if there is no genuine dispute as to any material issues of fact and the moving party is entitled to judgment as a matter of law. RUSCC 56(c). For the reasons set forth below, defendant's motion is denied in part and granted in part and plaintiff's cross-motion is denied in part and granted in part.

I.

This court discussed the calculation of periodic rent increases under HAP contracts at some length in *National Leased Housing Ass'n v. United States,* 22 Cl.Ct. 649, 658-59 (1991) *(NLHA)*. Herein, paragraph 1.8 of plaintiff's HAP contract provides:

> a. *Funding of Adjustments.* Housing assistance payments will be made in increased amounts commensurate with Contract Rent adjustments under this Section, up to the maximum amount authorized under Section 1.5a of this Contract.
>
> b. *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable Automatic Annual Adjustment Factor most recently published by the Government. Con-

tract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general increases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner shall submit to the Government financial statements which clearly support the increase.

d. *Overall Limitation.* Not withstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

e. *Incorporation of Rent Adjustment.* Any adjustment in Contract Rents shall be incorporated into Exhibit A by a dated addendum to the exhibit establishing the effective date of the adjustment.

HUD purported to make annual adjustments to the contract rent pursuant to paragraph 1.8b. HUD periodically determined and published Automatic Annual Adjustment Factors (AAAFs) in the Federal Register and annually adjusted the contract rent based on the most recent AAAFs. HUD made the first annual adjustment in 1979.

In early 1986, plaintiff prepared a study that purported to show that rents granted by HUD pursuant to this process were materially less than the rents charged for comparable unassisted units. Apparently relying on the "Overall Limitation" provision in paragraph 1.8d, in a March 17, 1986, letter, plaintiff requested that HUD base the periodic rent adjustments upon the higher of either the AAAFs or the rents charged for comparable unassisted units. HUD denied this request. HUD interpreted paragraph 1.8d to permit consideration of comparability studies only when such studies would result in a rent *less than* a rent that would result from application of the AAAFs, *i.e.*, the requirement in paragraph 1.8d that "adjustments . . . shall not result in material differences between the rents charged for assisted and comparable unassisted units" serves only to establish a ceiling and not a floor on periodic rent adjustments. Defendant contended that to obtain an adjustment that would result in rent higher than a rent that would result from application of the AAAFs, plaintiff was obliged to submit cost data and justify the increase pursuant to paragraph 1.8c.

II.

[1] In Count II of its complaint, plaintiff, in effect, contests HUD's interpretation of the "Overall Limitation" provision as creating only a ceiling and not a floor on periodic rent adjustments. Plaintiff contends, in effect, that the "Overall Limitation" provision entitles plaintiff to a rent not materially different from the rents charged for comparable unassisted units and that HUD violated this provision in

establishing the rents based on the AAAFs. As a matter of contract interpretation, plaintiff is correct. The "Overall Limitation" creates both a ceiling and a floor on periodic rent adjustments.

In *NLHA*, this court analyzed other pertinent provisions of paragraph 1.8d [there found in Paragraph 1.9d] and concluded that the "Overall Limitation" provision is an independent limitation that is "paramount" to the other limitations contained in paragraph 1.8. The court explained:

> Plaintiffs focus on paragraph 1.9b and stress the statement in paragraph 1.9b(2) that "[o]n each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable [AAAFs] most recently published by the Government." But, while the contract provides for adjustments under paragraph 1.9b(2) plus other "special additional adjustments" under paragraph 1.9c, the contract also renders these adjustments subject to the "Overall Limitation" in paragraph 1.9d. The wording of paragraph 1.9d is straightforward: "Not withstanding any other provisions of this Contract" rent adjustments provided in paragraph 1.9 "shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government." The title "Overall Limitation" and the phrase "[n]ot withstanding any other provisions of this Contract" indicate very precisely that the limitation in paragraph 1.9d is paramount; that it overrides any other provision in the contract, including paragraphs 1.9b and 1.9c, that otherwise would result in a rent adjustment that would produce a material difference from rents charged for comparable unassisted units. Hence, the "Overall Limitation" would appear to preclude HUD's use of the most recently published AAAFs in setting

> the rent adjustments when the amount of such adjustments would result in such "material differences."

22 Cl.Ct. at 658-59.

NLHA involved a situation in which HUD, based on comparability studies, granted an annual adjustment that resulted in a rent *less than* a rent that would have resulted from application of the AAAFs. But the reasoning of *NLHA* applies equally as well when the project owner, based on comparability studies, seeks to secure an adjustment that would result in a rent *higher than* a rent that would result from application of the AAAFs. The "Overall Limitation" is "paramount" and its wording is unambiguous. The adjustment "shall not result in *material differences* between the rents charged for assisted and comparable unassisted units" (emphasis added). *Webster's New Riverside Dictionary* (1984) defines the word "material" as "substantial" (p. 732) and defines the word "difference" as "[t]he amount by which one quantity is greater *or less* than another" (p. 376). There is no indication in the contract that the parties intended these terms to have meanings other than their commonly understood meanings. *Hol-Gar Mfg. Corp. v. United States,* 169 Ct.Cl. 384, 390, 351 F.2d 972, 976 (1965). Therefore, applying these dictionary definitions, paragraph 1.8 obliges that AAAF-based rent adjustments shall not result in rents substantially greater or less than the rents charged for comparable unassisted units. Defendant provides no basis in the wording of paragraph 1.8 or any logic for defining "difference" to involve a variance in only one direction.[1]

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[1] Defendant contends that Congress implicitly endorsed HUD's interpretation of paragraph 1.8 when in February 1988 it amended Section 8(c)(2) of the Housing Act by adding the following provision:

> If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under

Defendant's contention that a project owner seeking a rent higher than a rent calculated from application of the AAAFs is obliged to apply for such an increase under paragraph 1.8c is simply incorrect. Paragraphs 1.8c and 1.8d are aimed at different concerns. The focus of paragraph 1.8c is the project owner's operating expenses. Paragraph 1.8c permits a project owner potentially to secure a rent increase above that resulting from application of the AAAFs in instances where the project owner is faced with increase in its operating expenses for the project ("Special additional adjustments shall be granted . . . to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units . . . .") On the other hand, paragraph 1.8d is not concerned directly with changes in expenses but rather with differences in rents charged between the assisted units and comparable unassisted units. Expenses and rents, while related, can vary independently. For example, an owner of a project in a deteriorating neighborhood may find its expenses increasing while rents charged for comparable units in the neighborhood are decreasing. Similarly, the owner of a project in an improving area may find rents for comparable units rising much faster than any increases in its expenses. Thus, granting a rent increase

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[Section 8], *the [AAAFs] shall be applied.* The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects assisted under [Section 8] (including projects assisted under [Section 8] as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner.

42 U.S.C. § 1437f(c)(2)(C) (emphasis supplied). But this provision addresses a situation like that involved in *NLHA*, where HUD lowered rents based on its own comparability studies. It does not indicate that Congress considered and chose to address a situation where comparability studies were performed by the project owner and HUD refused to use those studies to increase the contract rent above that based on the applicable AAAFs.

under paragraph 1.8c "to reflect increases in . . . expenses" will not necessarily result in a rent that satisfies the comparability requirement in paragraph 1.8d. Paragraphs 1.8c and 1.8d simply offer project owners alternative routes for securing a rent increase greater than an increase that would result under the applicable AAAFs — the project owner may either present information relating to its increased costs in operating the property or, in the alternative, present information showing rents charged for comparable unassisted units.[2]

In the absence of significant support in the wording of the HAP contract, defendant reaches outside of the contract to support its interpretation of paragraph 1.8. Defendant argues that HUD's longstanding interpretation of paragraph 1.8 is that it sets a cap on rents, not a floor, and that this court should defer to this longstanding agency interpretation. In response, first, there is no support for this alleged longstanding interpretation in the HUD regulations that were in effect at the time of the contract, and there is no suggestion that HUD communicated this internal interpretation to plaintiff

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[2] In appropriate circumstances, paragraph 1.8c may result in a rent increase even when such increase would not necessarily be awarded based on comparability data. The "Overall Limitation" provision precludes only "*material* differences" (emphasis added) from rents charged for comparable unassisted units. Hence, the "Overall Limitation" does not preclude a rent increase pursuant to paragraph 1.8c where the increase produces a rent higher than the rents charged for comparable unassisted units, but the difference is not "material." Such an increase can be economically valuable. As explained in *NLHA*:

> While HUD's definition of "material" has allegedly varied over the years, the definition apparently has never been so broad as to encompass all economically significant differences. Indeed, since 1986, pursuant to a HUD memorandum, HUD has maintained that "[a] material difference exists whenever the adjusted Section 8 rent would *exceed* 120 percent times the sum of the comparable rent and the initial difference" (emphasis added).

22 Cl.Ct. at 661.

prior to entry into the contract. Second, in any event, HUD entered into a contractual agreement when it executed the HAP contract. It is the unambiguous terms of the contract, not the unilateral beliefs of one of the parties, that define the parties' respective obligations. *Lynch v. United States,* 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934) ("When the United States enters into contract relations, its rights and duties are governed generally by the law applicable to contracts between private individuals.")

III.

[2] Next, defendant presents two alternative arguments to support a conclusion that it should be granted summary judgment on Count II of plaintiff's complaint even if the phrase "material differences" is interpreted, as plaintiff proposes, to create both a cap and a floor on rent increases. First, the defendant contends that plaintiff failed to exhaust an unavailable administrative remedy for securing a higher contract rent after it completed its comparability study. Defendant contends that 24 C.F.R. § 888.204 permitted plaintiff, based on its comparability findings, to secure a higher contract rent by presenting its evidence of higher operating costs to HUD and having HUD modify the applicable AAAFs accordingly. Defendant then contends that by failing to request any revisions to the AAAFs for any of the years at issue in this case, plaintiff failed to exhaust available administrative remedies.

But Section 888.204 does not create any mandatory procedure that a project owner must follow to secure a rent increase to which it is otherwise entitled pursuant to the "Overall Limitations." Section 888.204 provides, in pertinent part:

> If the application of the [AAAFs] results in rents that are substantially lower than rents charged for comparable units not receiving assistance under the U.S. Housing Act

> of 1937, in the area for which the factor was published or a portion thereof, and it is shown to HUD that the costs of operating comparable rental housing have increased at a substantially greater rate than the [AAAFs], the HUD Field Office will consider establishing separate or revised [AAAFs] for that particular area. Any request for revision of the factors must be accompanied by an identification of the area.

Thus, while Section 888.204 creates one possible route for securing an upward rent adjustment, neither the contract nor the regulations make this route exclusive or otherwise oblige the project owner or HUD to take this route. Under the HAP contract, the project owner has a choice, in effect, either to submit its costs and seek an adjustment to the AAAFs pursuant to Section 888.204 or, in the alternative, to rely exclusively upon comparability data and seek an increase pursuant to the "Overall Limitation" provision. HUD similarly has authority to base a higher rent adjustment on either route. Under Section 888.204, in response to comparability studies and operating cost information, HUD will "consider" changing the applicable AAAFs, either by changing the AAAFs for the entire area or by splitting the geographic area covered by the AAAFs into smaller areas and then changing the AAAFs for only one particular area. Such a choice could benefit HUD in that it would avoid similar disputes with other project owners in the same area.

But Section 888.204 does not preclude HUD from instead addressing comparability disparities on a case-by-case basis by simply granting an upward adjustment to a level not materially different from the rents charged for comparable unassisted units. In effect, Section 888.204 does not oblige HUD, or the project owner, to react to a comparability disparity in a particular way. Under Section 888.204, HUD will "consider" addressing a comparability disparity by changing the AAAFs, but under the "Overall Limitation"

provision, HUD is obliged to address the disparity so as to avoid material differences between the rents charged for assisted and comparable unassisted units. Section 888.204 does not prohibit HUD from addressing the problem on a case-by-case basis.

[3] Next, defendant contends in the alternative that Count II of plaintiff's complaint is barred by the statute of limitations which obliges the filing of a claim "within six years after such claim first accrues." 28 U.S.C. § 2501. Defendant categorizes the government action in dispute here, in effect, as the use of AAAFs rather than comparability studies when calculating rent increases. Defendant then argues that the pertinent claims first accrued when HUD took such action on the one-year anniversary date of the HAP contract, June 1, 1979, more than six years before the instant suit was filed on December 8, 1988.

A claim first accrues on the date "when all the events have occurred which fix the liability of the government and entitle the claimant to institute an action." *Kinsey v. United States,* 852 F.2d 556, 557 (Fed. Cir. 1988). All the events necessary to fix government liability for the rent adjustments that occurred within six years of the filing of the instant action certainly did not occur by June 1, 1979. There were a myriad of necessary acts that had yet to occur. Plaintiff had a series of obligations to perform under the contract. Plaintiff had to provide apartments, including heat, light, water, and maintenance, to persons eligible for government subsidies. Defendant in turn, had to establish, calculate, and apply the applicable AAAFs each year and the AAAF-based adjustments would have to result in rents not materially different from the rents charged for comparable unassisted units.

Stated in a different way, under the HAP contract, each year created new obligations for each party. Even assuming HUD calculated the rent for one particular year improperly,

under the terms of the contract, the next year HUD would be under a separate and distinct obligation to have the new rent not materially different from the rents then charged for comparable unassisted units. In the event HUD failed to so modify the rents in a particular year, plaintiff had a new cause of action for the violation for that year.

Thus, while the statute of limitations would bar all claims based on rents paid more than six years before the filing of the instant suit, it would not bar claims based on rent determinations that occurred within the six-year statute of limitations.

IV.

While using a somewhat different approach, Claims I and III also attack defendant's failure to set the contract rents based upon the rents charged for comparable unassisted units. At oral argument, plaintiff explained, in effect, that Claims I, II, and III were intended as variations on a single theme and were not intended to raise any significantly different legal theories. But, as the court explained at oral argument, differences do exist between Claim II and Claims I and III, and Claims I and III potentially can raise legal issues that did not have to be resolved above when the court addressed Claim II. The parties' respective briefs deal mainly with the broad issues discussed above with respect to Claim II but do not focus sufficiently on the differences between Claim II and Claims I and III. Without such focused briefing, this court is hesitant to address Claims I and III. Moreover, the court's upholding of the legal theory behind Claim II may render Claims I and III duplicative from plaintiff's perspective. In this context, the court will deny the parties' respective summary judgment motions concerning Claims I and III, without prejudice to refiling. Any subsequent motions should focus on the pertinent distinctions between the claims.

At oral argument, the court and the parties discussed in detail Claims IV and V. For the reasons explained therein, the court denies the parties' respective motions for summary judgment regarding these claims without prejudice to refiling at some future time.

CONCLUSION

For the reasons set forth above, defendant's motion for summary judgment on Count II of plaintiff's complaint is granted to the extent plaintiff seeks recovery based on rent determinations made more than six years prior to filing the instant suit. Such claims are barred by the stature of limitations. Defendant's motion for summary judgment is denied in all other respects. Plaintiff's cross-motion for partial summary judgment on Count II is granted to the extent that this court will interpret the "Overall Limitation" provision as explained above. Plaintiff's motion is denied in all other respects. On or before May 14, 1992, the parties shall file a status report, jointly or separately, advising the court as to their intentions with respect to further proceedings in this action.

IT IS SO ORDERED.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS.

Nos. 6-87C, 324-87C, 204-88C and G-90C.

NATIONAL LEASED HOUSING ASSOCIATION, ET AL PLAINTIFFS.

v.

THE UNITED STATES, DEFENDANT.

[FILED] Dec. 21, 1994.

OPINION

ANDEWELT, Judge.

I.

In these consolidated actions, plaintiffs, National Leased Housing Association and 230 present or former owners of rental housing projects seek back-rent payments from the United States for housing units plaintiffs rented to low-income families pursuant to Section 8 of the United States Housing Act of 1937, as amended, 42 U.S.C. § 1437f (the Housing Act). Each plaintiff entered a Housing Assistance Payments (HAP) contract which, in effect, guaranteed to the project owner an initial specified contract rent for each housing unit rented to a low-income family and provided for periodic adjustments to that rent. Certain plaintiffs entered HAP contracts directly with the Department of Housing and Urban Development (HUD) while other plaintiffs entered HAP contracts with public housing agencies (PHAs), which previously had entered contracts with HUD. Plaintiffs contend that the periodic adjustments to the contract rents resulted in rents lower than those to which plaintiffs were entitled and plaintiffs seek related damages herein.

These actions are presently before the court for resolution of a series of issues raised in the parties' cross-motions for summary judgment. The court will address each issue in turn below. The court summarized the relevant background facts in two prior decisions and will not repeat those facts herein. *National Leased Housing Ass'n v. United States, 22 Cl.Ct. 649* (1991) *(NLHA I); National Leased Housing Ass'n v. United States, 24 Cl.Ct. 647* (1991) *(NLHA II)*.

II.

The first issue the court will address is defendant's contention that this court lacks jurisdiction over the claims presented by those plaintiffs that entered HAP contracts with the PHAs and not directly with HUD. Under the Tucker Act, 28 U.S.C. § 1491(a)(1), the Court of Federal Claims has jurisdiction "to render judgment upon any claim against the United States founded . . . upon . . . any express or implied contract with the United States." Defendant contends that for a claim to be "founded . . . upon . . . any express or implied contract with the United States" privity of contract must exist between a plaintiff and the United States, and that privity is lacking here for those plaintiffs that entered HAP contracts with the PHAs. Plaintiffs respond with two alternative arguments. First, plaintiffs allege that privity does exist here because the PHAs were acting as HUD's agents when the PHAs entered the HAP contracts with plaintiffs. Second, in the alternative, plaintiffs contend that privity of contract is not required because plaintiffs may bring suit as third-party beneficiaries of the contracts between HUD and the PHAs which authorized the PHAs to enter the HAP contracts with plaintiffs.

III.

A.

[1] Turning first to the agency issue, the statutory authority for HUD's use of a two-tier contracting scheme whereby HUD contracted with the PHAs and the PHAs subsequently contracted with the project owners is contained in Section 8(b)(2) of the Housing Act, as originally enacted in 1974, which provides:

> [T]he Secretary [of HUD] is authorized to make assistance payments pursuant to contracts with owners or prospective owners who agree to construct or substantially rehabilitate housing in which some or all of the units shall be available for occupancy by lower-income families in accordance with the provisions of this section . . . . The Secretary may also enter into annual contributions contracts with public housing agencies pursuant to which such agencies may enter into contracts to make assistance payments to such owners or prospective owners.

42 U.S.C. § 1437f(b)(2) (1982).[1]

Neither the first-tier contracts between HUD and the PHAs nor the second-tier contracts between the PHAs and the project owners contain any specific statement to indicate that in entering the HAP contracts with the project owners

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[1] Although Congress repealed Section 8(b)(2) of the Housing Act in 1983, that repeal did not affect HUD's commitments for payment of rent subsidies contained in then-existing HAP contracts pursuant to Section 8(b)(2). *See* Housing and Urban-Rural Recovery Act of 1983, Pub.L. No. 98-181, §§ 209(a)(2) and 209(b)(1), 97 Stat. 1153, 1155, 1183 (1983) (Section 8(b)(2) would "remain in effect . . . with respect to any funds obligated for a viable project under [the Housing Act] prior to January 1, 1984."). As plaintiffs acknowledge, the present version of Section 8(b)(2), enacted in 1990 as part of the Cranston-Gonzalez National Affordable Housing Act, Pub.L. No. 101-625, § 413(b)(1), 104 Stat. 4079, 4160 (1990), is not relevant to this litigation.

the PHAs were acting as HUD's legal agents. Hence plaintiffs, in effect, ask this court to imply an agency relationship from the provisions of the first- and second-tier contracts and the related facts.

B.

The first-tier contracts between HUD and the PHAs are referred to as Annual Contributions Contracts (ACCs).[2] In Sections 1.2 and 1.4 of the ACCs, respectively, HUD authorizes the PHAs to enter HAP contracts with project owners on behalf of low-income families and agrees to make annual contributions to cover the PHAs' housing assistance payments plus an allowance for administration costs. In Section 1.8, HUD designates the PHAs as "Contract Administrators" responsible for administering, in accordance with HUD regulations and subject to review by HUD, the HAP contracts the PHAs enter with the project owners. Section 2.3 of the ACCs describes family eligibility requirements to be enforced by the PHAs through the project owners; Section 2.4 to 2.15 outline certain inspection, nondiscrimination, equal employment, and financial requirements; and Section 2.16 defines events constituting default by the PHAs and allows HUD to assume the rights and obligations of the PHAs in order to meet the terms of the HAP contracts. The ACCs do not anywhere describe the calculation of annual adjustments to contract rents.

The second-tier contracts between the PHAs and the project owners, the HAP contracts, contain not only the signatures of the PHAs and the project owners, but also,

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[2] All citations to the ACCs in this decision refer to a sample contract included in Exhibit A of the appendix to defendant's March 10, 1994, filing. Because Part III of that sample contract is most commonly included as Part II of an actual ACC, the court has converted all references to Part III to Part II. For example, the court refers to Section 3.16 of the sample ACC as Section 2.16.

under the heading "APPROVED," the signature of an officer of HUD.[3] Section 1.5(c) of the HAP contracts provides that HUD's approval of an HAP contract signifies that HUD has properly executed an ACC with a PHA and has set aside funds for annual contributions to that PHA. With respect to HAP contract rents, Section 1.9(b)(1) of the HAP contracts requires the PHAs to adjust the contract rents on an annual basis upon the request of the project owners. Pursuant to Section 1.9(b)(2), the PHAs can adjust the contract rents upward or downward "as may be appropriate," but the rent may not fall below the initial guaranteed contract rent. Section 1.9(c) provides that the PHAs, with the approval of HUD, can grant "special additional adjustments" to the contract rents to reflect increased operating costs not covered by the annual adjustments. Section 1.9(d), entitled "Overall Limitation," provides that rent adjustments may not result in material differences between rents charged for assisted and comparable unassisted units as determined by the PHAs. In providing for adjustments to the contract rents, the HAP contracts refer to Automatic Annual Adjustment Factors (AAAFs) which are described in 24 C.F.R. pt. 888. These regulations require, *inter alia,* that the government calculate on an annual basis AAAFs which, subject to the overall limitation, may be used in determining HAP contract rent adjustments.

C.

Plaintiffs contend that given the nature of the relationships created in HUD's two-tier contracting scheme, the PHAs were acting as HUD's agents when they entered the second-tier HAP contracts with plaintiffs. Because plaintiffs entered contracts with HUD's agents, plaintiffs argue, they

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[3]All citations to the HAP contracts in this decision refer to the Blackduck Apartments sample contract included in Exhibit G of the appendix to plaintiffs' February 1, 1994, filing.

should be deemed to be in privity of contract with HUD. But courts have analyzed analogous two-tier contracting arrangements wherein HUD contracted with a local housing authority and the housing authority in turn contracted with a project developer, and the courts uniformly have rejected the argument that the housing authority acted as HUD's agent. *See New Era Constr. v. United States,* 890 F.2d 1152 (Fed.Cir.1989); *Marshall N. Dana Constr., Inc. v. United States,* 229 Ct.Cl. 862 1982 WL 26554 (1982); *G-Lam Corp. v. United States,* 227 Ct. Cl. 764, 1981 WL 21446 (1981); *Correlated Development Corp. v. United States,* 214 Ct.Cl. 106, 556 F.2d 515 (1977); *Housing Corp. of America v. United States,* 199 Ct. Cl. 705, 468 F.2d 922 (1972); *D.R. Smalley & Sons, Inc. v. United States,* 178 Ct. Cl. 593, 372 F.2d 505, *cert. denied,* 389 U.S. 835, 88 S.Ct. 45, 19 L.Ed.2d 97 (1967).

Housing Corp. involved HUD's use of a two-tier contracting arrangement to secure construction of low-income housing projects. Therein, HUD entered a contract with a local housing commission which in turn entered a contract with a project developer for the development, construction, and sale of a low-income housing project. In the first-tier contract between HUD and the housing commission, HUD agreed to fund up to 90 percent of the project costs. The second-tier contract between the housing commission and the project developer required HUD's approval, and HUD apparently had the authority to approve drawings, plans, and specifications and all changes in the contract price in excess of $4,000. *Housing Corp.*, 199 Ct. Cl. at 708, 468 F.2d at 923-24. Article IX of the second-tier contract described the requirement for HUD's approval as follows:

> ARTICLE IX. *Approval by Government.* The approval of this Agreement by the Government signifies that the undertaking by the Purchaser of the acquisition of the property constitutes a "project" eligible for financial assis-

> tance under the Annual Contributions Contract identified in Exhibit "C;" that said Annual Contributions Contract has been properly authorized; that funds have been reserved by the Government and will be available to effect payment and performance by the Purchaser hereunder; and the Government approval of the terms and conditions hereof.

Id. at 708, 468 F.2d at 923.

Despite HUD's intimate involvement in and control over the terms of the second-tier contract, the *Housing Corp.* court rejected the project developer's contention that it could sue HUD directly to recover construction costs because the local housing commission had acted as HUD's agent. Pointing to the opening paragraph of the second-tier contract, which identified the parties to the contract as the local housing commission and the project developer, the court stated: "This [paragraph] makes it rather clear who the parties are and [HUD] is not one of them." *Id.* at 709, 468 F.2d at 924. The court noted that the level of government involvement in the second-tier contract between the public housing commission and the project developer, including the requirement that HUD sign and approve the contract, did not mean that the project owner could sue the government directly. The court explained:

> The contract here in issue is one of many pursuant to which the Federal Government subsidizes projects of state and local authorities for the public betterment. The United States, however, does not make itself a party to the contracts relating to said projects but obligates itself by separate agreements, as here, to local authorities for the funding of those projects it approves. The significance of that approval is spelled out here in Article IX. This does not create an express or implied contract between plaintiff and defendant nor does it make the Commission defendant's agent through HUD.

Id. at 710, 468 F.2d at 924.

Dana Constr., 229 Ct.Cl. at 862, involved the same type of contracting scheme and therein, the Court of Claims restated essentially the same point, as follows:

> [I]t is settled that there is no privity of contract between the U.S. and a public housing contractor based on the U.S. Housing Act. That the Federal Government has intimate control over a project, including prior approval of plans and costs, does not establish liability here for claims by a contractor. Nor does this degree of involvement indicate an implied-in-fact contract enforceable against the United States. This is true even if the local agency is acting merely as a conduit for the federal funds. By funding and regulating programs designed for the public good the U.S. is acting in its role as a sovereign and the moneys promised are gifts or gratuities which do not establish any contractual obligation, express or implied, on the part of the United States.

Id. at 863-864 (citations omitted).

The instant contracts between HUD and the PHAs and between the PHAs and plaintiffs are structured in a way similar to that of the two-tier contracts involved in *Housing Corp.* and *Dana Constr.* In the instant case, as in *Housing Corp.* and *Dana Constr.*, HUD is not listed as a party to the second-tier contracts but rather only as an entity whose approval is required. The approval provision in Section 1.5 of the instant second-tier contracts is analogous to Article IX of the second-tier contract in *Housing Corp.*, and provides:

> a. *Identification of [the ACC].* The [PHA] has entered into an [ACC] with the Government . . . under which the Government will provide financial assistance to the [PHA] pursuant to section 8 of the [Housing]

> Act for the purpose of making housing assistance payments . . . .
>
> * * * * * *
>
> c. *Government Approval of [the HAP] Contract.* The approval of this [HAP] Contract by the Government signifies that the Government has executed the ACC and that the ACC has been properly authorized; that the faith of the United States is solemnly pledged to the payment of annual contributions pursuant to said ACC; and that funds have been obligated by the Government for such payments to assist the [PHA] in the performance of its obligations under the [HAP] Contract.

Hence, HUD's payments are not directed at paying HUD's own obligations to the local project owners, but rather at "assist[ing] the [PHA] in the performance of [the PHA's] obligations."

D.

Plaintiffs argue that *Housing Corp.* and *Dana Constr.* are distinguishable from the instant case because those cases involved pre-Section 8 housing legislation where HUD acted in a sovereign capacity when it funded the projects. Under Section 8, plaintiffs argue, HUD acted in a proprietary capacity in that HUD, like any other business enterprise, exploited the benefits of the private housing market to purchase housing services from the entities that owned the resources. But this distinction does not serve to distinguish Section 8 cases from the pre-Section 8 situation. In the two-tier contracting arrangement in *Housing Corp.*, HUD exploited the private market in much the same way as in the two-tier arrangement here. In *Housing Corp.*, HUD exploited the private market for the development of a real estate housing project when it sought to encourage produc-

tion of low-income housing by the private sector by agreeing to fund up to 90 percent of the project costs. Moreover, not only are the means HUD used in the pre-Section 8 cases analogous to those used here, but also HUD's ultimate aim in the two-tier contracting arrangements under both legislative schemes is precisely the same — to secure housing in certain localities for low-income families.

E.

Next, plaintiffs argue that *Housing Corp.* and *Dana Constr.* are distinguishable from the instant case because under the statutory schemes involved in those cases, HUD used the two-tier contracting scheme for all low-income housing contracts, but under Section 8 HUD frequently contracted directly with the project owners. Because HUD accomplished the same objectives through the PHAs as it achieved through direct contracts with the project owners, and because the same rules, including HUD regulations, generally applied to both contracts, plaintiffs argue that when HUD chose to employ PHAs instead of direct contracts with the project owners, HUD necessarily used the PHAs as its agents. But the legislative history of Section 8 supports the conclusion that Congress intended the PHAs not to act as HUD's agents, but rather as the entities primarily responsible for carrying out Section 8 objectives. *See* S.Rep No. 93-693, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4314 ("The Committee is firmly convinced that primary responsibility for carrying out the leasing program should be vested in public housing agencies.").

[2] A second and more fundamental problem with plaintiffs' argument is that to say that HUD had two choices available to accomplish the same goal is not to say that the two choices have the same legal effect. The requirement for privity of contract has an important legal basis which plain-

tiffs do not seem fully to appreciate. It is a fundamental legal tenant that the United States as sovereign is immune from suit except where it consents to be sued and that any such waiver of sovereign immunity must be narrowly construed. *United States v. Mitchell,* 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980); *United States v. Testan,* 424 U.S. 392, 399, 96 St.Ct. 948, 953, 47 L.Ed.2d 114 (1976). Where the government enters a contract directly with a party, it expresses its intent to open itself to a suit by that party in this court under the Tucker Act because such suit would unquestionably be "upon [an] express contract with the United States." 28 U.S.C. § 1491(a)(1). When the government chooses instead to employ a two-tier contracting scheme whereby it has no direct contractual relationship with an entity, the intent to permit that entity to sue the United States is not similarly apparent from the wording of the Tucker Act.

Based apparently in part upon this concern, courts have not been willing to allow suits against the government based on an agency theory unless the contract contains a reasonably clear indication that the government intended to create an agency relationship and to permit such a suit. *United States v. Johnson Controls, Inc.,* 713 F.2d 1541 (Fed. Cir. 1983). In *Johnson Controls,* the court reviewed the precedent relating to the ability of a subcontractor to bring a suit on a government contract directly against the United States. The court concluded that the precedent established three prerequisites for such a suit. "[In that precedent,] the prime contractor was (1) acting as a *purchasing* agent for the government, (2) the agency relationship between the government and the prime contractor was established by clear contractual consent, and (3) the contract stated that the government would be directly liable to the vendors for the purchase price." *Id.* at 1551.

Herein, even assuming the PHAs could be said, in effect, to have been acting as purchasing agents for HUD, the second and third prerequisites of *Johnson Controls* are not satisfied. As to the second requirement, there is no "clear contractual consent" establishing an agency relationship. Unlike the two cases cited in *Johnson Controls* as the basis for this prerequisite,[4] neither the contracts between HUD and the PHAs nor the contracts between the PHAs and plaintiffs contain a specific statement that the PHAs were acting as HUD's agents.

Plaintiffs rely primarily upon Sections 1.2 and 1.8 of the ACCs, which provide:

> 1.2 *AUTHORIZATION OF ACTIONS BY PHA.* The PHA is authorized to (a) enter into an Agreement, (b) enter into a Contract, (c) make housing assistance payments on behalf of Families, and (d) take other necessary actions, all in accordance with the forms, conditions, regulations, and requirements prescribed or approved by HUD. However, neither the PHA nor HUD shall assume any obligation beyond that provided in the HUD-approved Agreement and Contract.
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> * * * * * *
>
> 1.8 *RESPONSIBILITY FOR ADMINISTRATION OF [THE HAP] CONTRACT.* The PHA as Contract Administrator (CA) is primarily responsible for administration of the [HAP] Contract in accordance

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[4] In *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 112 n. 2, 74 S.Ct. 403, 405 n. 2, 98 L.Ed. 546 (1954), the construction contract provided that " '[t]he Contractor shall act as the purchasing agent of the Government in effecting such procurement.' " In *Western Union Tel. Co. v. United States*, 66 Ct.Cl. 38, 1928 WL 3062 (1928), the construction contract named the prime contractor as the "construction manager" and provided that the construction manager was " 'empowered and authorized to make, as agent for the United States of America, all contracts.' "

> with this ACC and HUD regulations and requirements, subject to review and audit by HUD.

But, in effect, what HUD accomplishes in these provisions is to require the PHAs to perform certain specified actions in a manner prescribed by HUD. Government agencies make analogous demands in every government contract. Under *Johnson Controls,* such limitations in a contract are not sufficient; there must be a "clear contractual consent" for an agency relationship to arise. Rather than expressing a clear contractual consent that the PHAs will operate as HUD's agents when carrying out the terms of the HAP contracts, Sections 1.2 and 1.8 of the ACCs seem to point in the opposite direction. Section 1.2 stresses that HUD will not assume any obligation not provided for in the ACCs and the HAP contracts. Section 1.8, rather than demonstrating an intent to interact directly with the project owners, indicates that HUD removed itself from direct interaction with the project owners and left administration of the HAP contracts primarily up to the PHAs.

Turning to the third prerequisite of *Johnson Controls,* neither the ACCs nor the HAP contracts contain a statement that HUD would be directly liable to the project owners if, as alleged here, the PHAs improperly calculated periodic rent adjustments. To the contrary, as noted above, Section 1.5(c) of the HAP contracts anticipates that HUD's payments would be directed at assisting the PHAs in performing the PHAs' obligations to the project owners rather than at paying HUD's obligations to the project owners.

Plaintiffs rely on Section 2.16(a) of the ACCs as evidence of HUD's direct liability to the project owners, but that section does not purport to create direct liability on the instant facts.[5] Section 2.16(a) authorizes HUD, in the event

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[5] Section 2.16(a) provides:

of default by the PHAs, to assume the rights and obligations of the PHAs under the HAP contracts. Section 2.16(a)

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(1) *Events of Default.* The occurrence of any of the following events if the Owner is not in default, shall constitute a default under this ACC:

(i) If the PHA fails to perform or observe any term or condition of the Agreement or Contract with the Owner;

(ii) If the Agreement or Contract is held to be void, voidable, or ultra vires;

(iii) If the power or right of the PHA to enter into the Agreement or Contract is drawn into question in any legal proceeding; or

(iv) If the PHA asserts or claims that the Agreement or Contract is not binding upon the PHA for any such reason.

(2) *Owner Request for HUD Determination of Default.* If the Owner believes that an event as specified in paragraph (a)(1) has occurred, and the Owner is not in default, the Owner may, within 30 days of the initial occurrence of the event;

(i) Notify HUD of the occurrence of the event;

(ii) Provide supporting evidence of the default and of the fact that the Owner is not in default; and

(iii) Request HUD to determine whether there has been a default.

(3) *HUD Determination of Default and Curing of Default.* HUD, after notice to the PHA giving it a reasonable opportunity to take corrective action, or to demonstrate that it is not in default, shall make a determination whether the PHA is in default and whether the Owner is not in default. If HUD determines that the PHA is in default and that the Owner is not, HUD shall take appropriate action to require the PHA to cure the default. If necessary for the prompt continuation of the project, HUD shall assume the PHA's rights and obligations under the Agreement and/or Contract in accordance with paragraph (b)(3).

(4) *Enforcement by Owner.* The provisions of this paragraph (a) are made for the benefit of the Owner, the lender, the PHA where it is the lender and then only in its capacity as lender, and the Owner's other assignees, if any, who have been specifically approved by HUD prior to the assignment. These provisions shall be enforceable by these parties against HUD by suit at law or in equity.

further provides that its provisions shall be enforceable by a project owner "against HUD by suit at law or in equity," but only after the occurrence of the following events: (1) the project owner requests HUD to determine whether a default has occurred; (2) HUD, after affording the PHA an opportunity to "take corrective action," determines that the PHA is in default; and (3) HUD assumes the PHA's rights and obligations under the HAP contract. At most, therefore, HUD has undertaken a secondary, contingent liability to the project owners which is dependent upon HUD's determining that the PHAs are in default and HUD's assuming the rights and obligations of the PHAs under the HAP contracts. Plaintiffs have not alleged that either of these two conditions exists with respect to any of those plaintiffs that entered the HAP contracts with the PHAs. Because Section 2.16 establishes prerequisites for HUD's liability and because those requirements were not satisfied here, HUD is not directly liable to those plaintiffs. In *Correlated Development,* 214 Ct.Cl. at 115, 556 F.2d at 521, the Court of claims interpreted a contract provision analogous to Section 2.16 in this same way, as follows:

> We do not agree that Section 13 gives the plaintiff the right to maintain this suit against the government. The simple answer to plaintiff's argument in this regard is the fact that none of the contingencies mentioned in Section 13 ever occurred. There was never a substantial default by [the PHA]; the government never took over nor completed the projects nor was ever requested to do so by the [PHA] or the plaintiff; nor was the right, title, or interest of [the PHA] in the projects ever delivered or transferred to the government.

IV.

[3] Next, plaintiffs argue that even if their agency theory fails, they can bring the instant suit directly against

HUD on the alternate theory that they are third-party beneficiaries of the contracts between HUD and the PHAs. Under the doctrine of third-party beneficiaries, an entity that is not a party to a contract nevertheless can bring a suit on that contract when the contract is intended for that entity's direct benefit. *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230, 33 S.Ct. 32, 35, 57 L.Ed. 195 (1912) ("Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he is not a party, he must, at least show that it was intended for his direct benefit."). *See also Robo Wash, Inc. v. United States*, 223 Ct.Cl. 693, 1980 WL 13154 (1980) (applying the third-party beneficiary theory to government contracts).

The *Restatement (Second) of Contracts* § 302 (1979) proposes the following standard for determining whether a third party is an intended beneficiary of a contract: "Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties." This standard is especially appropriate with respect to suits brought against the United States because if the United States did not intend to allow a contract action against it by an entity that is not a party to the contract, then it can be argued that the United States never waived sovereign immunity so as to authorize such a suit.

[4] Allowing plaintiffs to bring the instant suit directly against the United States would not effectuate HUD's intent when HUD entered the ACCs with the PHAs. HUD's intent, as exhibited in the provisions of the ACCs, was to create a two-tier contracting arrangement in which, unless an exception such as Section 2.16 applied, the project owners would interact directly with the PHAs, not HUD, in the administration of the HAP contracts. In this regard, the

instant case is not a typical third-party beneficiary case where a third party would not have any legal means to secure a contractual benefit unless the court recognized that party's right to bring a cause of action as a third-party beneficiary. The ACCs anticipate that the PHAs would in turn enter HAP contracts directly with the project owners and that these second-tier contracts would provide the project owners with contractual rights enforceable against the PHAs. The HAP contracts oblige the PHAs to grant periodic rent adjustments and provide that such adjustments may not result in material differences between rents charged for assisted and comparable unassisted units "as determined by the [PHAs]." Hence, in the event the PHAs did not live up to their obligations with respect to periodic rent adjustments, the project owners could bring suit directly against the PHAs.

To support their argument that they are proper third-party beneficiaries, plaintiffs cite several district court decisions in which the courts allowed tenants to bring suits against HUD as third-party beneficiaries of ACCs. *See e.g., Henry Horner Mothers Guild v. Chicago Housing Authority,* 824 F.Supp. 808, 820 (N.D.Ill.1993); *Gomez v. Housing Authority,* 805 F.Supp. 1363, 1368 (W.D.Tex.1992); *Hurt v. Philadelphia Housing Authority,* 806 F.Supp. 515, 527 (E.D.Pa. 1992); *Henry Horner Mothers Guild v. Chicago Housing Authority,* 780 F.Supp. 511, 515 (N.D.Ill.1991); *Tinsley v. Kemp,* 750 F.Supp. 1001, 1012 (W.D.Mo.1990); *Concerned Tenants of Father Panik Village v. Pierce,* 685 F.Supp. 316, 323 (D.Conn.1998). The Section 8 program, however, is directed at securing quality housing for low-income families. In that sense, the tenants of the low-income housing are more appropriately characterized as the "intended beneficiaries" of the ACCs than are the project owners. In any event a determination as to whether a particular individual or class of individuals is a third-party beneficiary of a contract must be made on an individual-by-

individual or class-by-class basis. Before declaring that any individual or class of individuals is a third-party beneficiary, a court would have to determine whether allowing such a third-party beneficiary suit would effectuate the intent of the parties to the contract. Herein, assuming the district court decisions are correct, a determination that allowing tenants to bring a certain type of suit against HUD would effectuate the intent of the parties to the ACCs does not mean that allowing a different class of individuals, *i.e.*, the project owners, to bring a different type of suit against HUD, *i.e.*, a suit for increased periodic rent adjustments, would also effectuate the parties' intent. To the contrary, as explained above, the parties' intent as exhibited in the provisions of the ACCs points against allowing direct suits against HUD by the project owners where the prerequisites of Section 2.16 do not apply.

Thus, for the reasons set forth above, those plaintiffs that entered HAP contracts with the PHAs rather than directly with HUD may not bring a breach of contract suit against defendant because those plaintiffs lack privity of contract with HUD and are not third-party beneficiaries of the ACCs.

V.

A.

Pursuant to Sections II through IV, *supra*, the plaintiffs remaining in this action are those plaintiffs that entered HAP contracts directly with HUD. The parties' cross-motions for summary judgment raise a series of issues with respect to these plaintiffs. The first issue the court will address involves HUD's use of comparability studies when calculating the periodic adjustments to the HAP contract rents. Plaintiffs contend that the HAP contracts do not permit HUD to rely upon such studies to decrease the contract rents below the amount HUD guaranteed for the

prior year. Defendant disagrees. Resolution of this issue requires interpreting the rent adjustment provision contained in Section 1.9 of the HAP contracts and, more specifically, the overall limitation contained in Section 1.9(d).

[5] The rent adjustment provision of the HAP contracts between HUD and the project owners provides, in pertinent part:

1.9 *RENT ADJUSTMENTS*

* * * * * *

b. *Automatic Annual Adjustments.*

(1) [AAAFs] will be determined by the Government at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by the Government where utilities are paid directly by the Families.

(2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable [AAAFs] most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted Contract Rents be less than the Contract Rents on the effective date of the Contract.

c. *Special Additional Adjustments.* Special additional adjustments shall be granted, when approved by the Government, to reflect increases in the actual and necessary expenses of owning and maintaining the Contract Units which have resulted from substantial general increases in real property taxes, utility rates, or similar costs (i.e., assessments, and utilities not covered by regulated rates), but only if and to the extent that the Owner clearly demonstrates that such general in-

creases have caused increases in the Owner's operating costs which are not adequately compensated for by automatic annual adjustments. The Owner shall submit to the Government financial statements which clearly support the increase.

Overall Limitation. Not withstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

Pursuant to the overall limitation in Section 1.9(d), HUD conducted studies for certain rental units covered under the HAP contracts to determine the rents charged for comparable unassisted units. When those studies indicated that a rent increase based on the applicable AAAFs under Section 1.9(b) would result in a Section 8 rent that materially exceeded the rents charged for comparable unassisted units, HUD took action to avoid such a material difference. In certain cases, HUD avoided the difference by not making any adjustment at all, and in other cases, HUD granted a lower increase than would have resulted from the grant of a full AAAF-based adjustment. In yet other instances, where comparability studies showed that the existing rent was already materially in excess of the rents charged for comparable unassisted units, HUD decreased the existing rent.

In *NLHA I*, 22 Cl.Ct. at 658-59, this court concluded that pursuant to the overall limitation in Section 1.9(d), HUD was not obliged to grant a rent adjustment based upon the applicable AAAFs when comparability studies demonstrated that such an adjustment would result in a rent

materially above those rents charged for comparable unassisted units. In so interpreting Section 1.9(d), this court disagreed with the Court of Appeals for the Ninth Circuit's prior interpretation of this same provision in *Rainier View Assocs. v. United States,* 848 F.2d 988 (9th Cir.1988), *cert. denied,* 490 U.S. 1066, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989). After *NLHA I,* the Supreme Court reviewed the approach the Ninth Circuit had adopted in *Rainier View* and, employing essentially the same reasoning as this court had employed in *NLHA I,* rejected the *Rainier View* analysis. *Cisneros v. Alpine Ridge Group,* — U.S. — , 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). Because the Supreme Court has spoken on this issue, plaintiffs no longer dispute that the overall limitation authorizes HUD, in appropriate circumstances, either to grant a rent increase less than the full upward adjustment called for in the applicable AAAFs or to grant no increase at all. Plaintiffs contend, however, that where application of the AAAFs would result in increases in the contract rents, HUD can only limit or eliminate those increases and may not use comparability studies to decrease the existing contract rents. Defendant disagrees and contends that the overall limitation obliges HUD to lower the contract rents in such instances to eliminate material differences that may have resulted from adjustments in prior years.

B.

Defendant's interpretation is correct. The overall limitation provision does not limit HUD's actions to the extent plaintiffs propose. The overall limitation contains no statement that HUD may decrease the contract rent only when the AAAFs are negative. To the contrary, the mandate in the overall limitation that adjustments under Section 1.9 "shall not result in material differences" is absolute and therefore refers to all adjustments granted under the rent

adjustment provision, including prior year adjustments. To the extent that a decrease in the contract rent is necessary to assure that prior year adjustments do not now result in a rent materially in excess of comparable rents, the overall limitation requires HUD to lower the contract rent to eliminate that difference.

Although *Alpine Ridge* did not address this precise point, the discussion therein of the Section 8 program and the overall limitation supports this court's interpretation. The rent adjustment provision in the HAP contracts implements Section 8(c)(2)(C) of the Housing Act,[6] which the Court in *Alpine Ridge* described as follows:

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[6]Section 8(c)(2)(C)of the Housing Act provides:

Adjustments in the maximum rents under subparagraphs (A)and (B) shall not result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, as determined by the Secretary. In implementing the limitation established under the preceding sentence, the Secretary shall establish regulations for conducting comparability studies for projects where the Secretary has reason to believe that the application of the formula adjustments under subparagraph (A) would result in such material differences. The Secretary shall conduct such studies upon the request of any owner of any project, or as the Secretary determines to be appropriate by establishing, to the extent practicable, a modified annual adjustment factor for such market area, as the Secretary shall designate, that is geographically smaller than the applicable housing area used for the establishment of the annual adjustment factor under subparagraph (A). The Secretary shall establish such modified annual adjustment factor on the basis of the results of a study conducted by the Secretary of the rents charged, and any change in such rents over the previous year, for assisted units and unassisted units of similar quality, type, and age in the smaller market area. Where the Secretary determines that such modified annual adjustment factors cannot be established or that such factor when applied to a particular project would result in material differences between the rents charged for assisted units and unassisted units of similar quality, type, and age in the same market area, the Secretary may apply an alternative methodology for conducting comparability

> [T]he Housing Act. . . provides that "[a]djustments in the maximum rents," whether based on market surveys or on a reasonable formula, "shall not result in material differences" between Section 8 rents and the rents for comparable housing on the private market.

Id. at _____, 113 S.Ct. at 1903.

Plaintiffs' interpretation of the overall limitation would undermine Section 8(c)(2)(C) because it would oblige HUD to pay rents for Section 8 units that, as a result of prior year adjustments, are materially higher than rents charged for comparable unassisted units. For example, under plaintiffs' interpretation, where HUD's comparability studies reveal that prior year adjustments based on then-applicable AAAF's have resulted in rents materially higher than rents charged for comparable unassisted units, HUD

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studies in order to establish rents that are not materially different from rents charged for comparable unassisted units. If the Secretary or appropriate State agency does not complete and submit to the project owner a comparability study not later than 60 days before the anniversary date of the assistance contract under this section, the automatic annual adjustment factor shall be applied. The Secretary may not reduce the contract rents in effect on or after April 15, 1987, for newly constructed, substantially rehabilitated, or moderately rehabilitated projects or moderately rehabilitated projects, assisted under this section (including projects assisted under this section as in effect prior to November 30, 1983), unless the project has been refinanced in a manner that reduces the periodic payments of the owner. Any maximum monthly rent that has been reduced by the Secretary after April 14, 1987, and prior to November 7, 1988, shall be restored to the maximum monthly rent in effect on April 15, 1987. For any project which has had its maximum monthly rents reduced after April 14, 1987, the Secretary shall make assistance payments (from amounts reserved for the original contract) to the owner of such project in an amount equal to the difference between the maximum monthly rents in effect on April 15, 1987, and the reduced maximum monthly rents, multiplied by the number of months that the reduced maximum monthly rents were in effect.

42 U.S.C. § 1437(c)(2)(C).

would be obliged to continue to pay those above-market rents unless HUD calculated a negative AAAF which would eliminate the entire difference. But as explained in *NLHA I*, 22 Cl.Ct. at 662 & n. 10, forcing HUD to rely upon a modified AAAF rather than the overall limitation could add significant costs to HUD's implementation of Section 8 without any necessary countervailing benefits to either HUD or the project owners. Moreover, in *Alpine Ridge*, the Supreme Court rejected an analogous effort to interpret the rent adjustment provision in a way that would require HUD to base rent adjustments on the AAAFs rather than on comparability studies. Rejecting the Ninth Circuit's analysis in *Rainer View*, the Supreme Court explained:

> In its *Rainier View* decision, the Court of Appeals read § 1.9d's "overall limitation" as empowering HUD only to make prospective changes in the automatic adjustment factors where it discovered that those factors were producing materially inflated rents; under the court's view, § 1.9d would not permit "abandonment of the formula method whenever application of the formula would result in a disparity between section 8 and other rents." 848 F.2d at 991. But this reading of the contract — under which Section 8 project owners could demand payment of materially inflated rents until the Secretary could publish revised automatic adjustment factors aimed at curing the overpayment — is almost precisely backwards. It would entitle project owners to collect the formula-based adjustments promised by § 1.9b *notwithstanding* that those adjustments were resulting in the sort of material differences in rents prohibited by § 1.9d.

Alpine Ridge, ____ U.S. at ____, 113 S.Ct. at 1903-04. Here, as in *Alpine Ridge*, the project owners "demand payment of materially inflated rents until the Secretary could publish revised automatic adjustment factors aimed at

curing the overpayment." Thus, as in *Alpine Ridge*, this court must reject plaintiffs' interpretation of the overall limitation as inconsistent with the wording of both the overall limitation and Section 8(c)(2)(C) of the Housing Act, which the overall limitation sought to implement.

C.

Interpreting the overall limitation and Section 8(c)(2)(C) as expressing an overarching concern that Section 8 rents not be materially different from rents charged for comparable unassisted units would seem consistent with the parties' reasonable economic expectations when they entered the HAP contracts. If the project owners did not enter HAP contracts with HUD, they could expect to rent their units to tenants on the open market at rents approximating those charged for comparable unassisted units. Similarly, if HUD, without the benefit of the HAP contracts, tried to find apartments for low income families, HUD could expect to pay approximately market rents. Therefore, interpreting the overall limitation provision to require adjustment of the contract rents in order to eliminate any material differences between the rents charged for assisted and comparable unassisted units would be generally consistent with the reasonable expectations of both HUD and the project owners as to the value of the rented units. HUD and the project owners would both be assured that contract rents would not stray too far from market rents. HUD could expect to pay and the project owners could expect to receive rents not materially different from the rents charged for comparable units on the open market.

Moreover, this interpretation would not create any unreasonable burden on HUD or the project owners. Section 1.9 of the HAP contracts anticipates that rent adjustments ordinarily will be based on the AAAFs and that any adjustment based on comparability studies will be the exception.

Id. at ____, 113 S.Ct. at 1904. This is so because the overall limitation does not prohibit every difference between rents charged for assisted and comparable unassisted units. The overall limitations proscribes only material differences, and since 1986, HUD has interpreted material differences according to a 1986 HUD memorandum which provides that "a material difference exists whenever the adjusted Section 8 rent would exceed 120 percent times the sum of the comparable rent and the initial difference." This approach appears to be a reasonable application of the overall limitation, *see Park Village Apartments v. United States,* 32 Fed.Cl. 441, 451-53 (1994), and therefore, given the 120 percent threshold, the overall limitation should apply only in exceptional circumstances.

D.

To support their position that the overall limitation does not authorize HUD to decrease contract rents when the AAAFs are positive, plaintiffs rely upon the legislative history of amendments to the Housing Act incorporated into the Housing and Community Development Act of 1987, Pub.L. No. 100-242, § 142, 101 Stat. 1815, 1850 (1988). The pertinent House Report provides, in relevant part:

> When it enacted the Sec. 8 program, Congress intended that rents for project-based assisted projects would be reduced only if the published Automatic Annual Adjustment Factor ("AAAF") was negative; reflecting a noticeable general downturn of rents in the market area. Although no negative adjustment factors have been published to date, HUD field offices have been making capricious individualized rent reductions nonetheless .... To eliminate these arbitrary practices not justified under current law, Sec. 142(d) [of the House bill] prohibits reductions in rents in effect on or after April 15, 1987,

unless the project has been refinanced and the monthly mortgage payments have been reduced.

H.R. No. 122(I), 100th Cong., 1st Sess. 32 (1987), reprinted in 1987 U.S.C.C.A.N. 3317, 3348.

This legislative history is not sufficient for plaintiffs to prevail. First, the legislative history was not drafted when the pertinent language of Section 8 was enacted in 1974, but rather was produced 13 years later in connection with amendments to the Housing Act. As the Supreme Court recognized in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S.Ct. 2668, 2678, 110 L.Ed.2d 579 (1990), subsequent legislative history is a "hazardous basis for inferring the intent of an earlier' Congress" (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 332, 4 L.Ed.2d 334 (1960)). *See also Weinberger v. Rossi*, 456 U.S. 25, 35, 102 S.Ct. 1510, 1518, 71 L.Ed.2d 715 (1982) ("[p]ost hoc statements of a congressional committee are not entitled to much weight"); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758, 99 S.Ct. 2066, 2072, 60 L.Ed.2d 609 (1979). Indeed, plaintiffs rely upon the report of a single committee in the 100th Congress which purports to describe the intent of the entire Congress 13 years earlier when Congress enacted Section 8 of the Housing Act. It would seem a virtually impossible task for a single committee to determine with any reasonable degree of certainty the unstated intent of the entire Congress 13 years prior.

Second, the wording of the legislative history suggests that the committee may have focused more on its own concerns in 1987 than on the intent of Congress in 1974. The House Report states that "[w]hen it enacted the [Section 8] program, Congress intended that rents for project-based assisted projects would be reduced only if the published [AAAF] was negative." Yet, the pertinent wording of Section 8 as enacted demonstrates no such intent. Section 8 provides that "[t]he assistance contract shall

provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula." 42 U.S.C. § 1437f(c)(2)(A). Hence, Section 8 did not originally mandate HUD's use of any formula, much less an AAAF-based formula. HUD did not first propose to use AAAFs until after the enactment of Section 8 at the end of 1974. Moreover, the wording of Section 8 does not support the conclusion that Congress intended that contract rents never be decreased based on comparability determinations. One of the two alternatives available to HUD was to have rent adjustments "reflect changes in the fair market rentals," and when market rents go down, a decrease in Section 8 rents may be required to "reflect changes in the fair market rentals." Given the lack of support in the wording of the statute and the passage of time between the enactment of the statute and the legislative history upon which plaintiffs rely, the court will not interpret Section 8 as enacted in 1974 as having the meaning ascribed to it in the 1987 committee report.

VI.

A.

[6] The next issue the court will address involves the proper interpretation of the proviso in the overall limitation which states: "provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to initial Contract Rents." Plaintiffs contend that "the extent that such differences may have existed," referred to by the parties as the "initial difference," must be calculated as a fixed percentage. Thus, for example, if the original contract rent is $250

and rents charged for comparable unassisted units at the time is $200, plaintiffs contend that the initial difference is 25 percent. Defendant responds that the initial difference is a fixed dollar amount and hence, the initial difference in that situation is $50. Such a dispute becomes economically significant when rents increase substantially over time. For example, if the comparable rents in the situation hypothesized above rose from $200 to $500, adding the 25 percent initial difference would yield a rent of $625, and adding the $50 difference would yield a rent of $550.

Focusing exclusively on the wording of the proviso in the overall limitation, the court's initial reaction is that the phrase "the extent that . . . differences [in rents] may have existed" refers to a dollar difference rather than a percentage difference. Rents ordinarily are stated in dollar amounts and a determination of the extent to which two rents differ ordinarily will involve a determination of the dollar difference between the rents. Unless the court is specifically asked to determine the *percentage* difference, the court would describe the difference between a $200 and a $250 rent as $50 and not as the second rent being 25 percent higher than the first or the first being 20 percent lower than the second.

This interpretation is consistent with the pertinent dictionary definitions. In the proviso in the overall limitation, the word "difference" is used as a mathematical term. *The American Heritage Dictionary* 395 (2nd ed. 1982), defines "difference" in pertinent part as follows: "Math. a. The amount [defined as "[a] number," *id.* at 103, which in turn is defined as a "positive integer," *id.* at 852] by which one quantity is greater or less than another. b. The amount that remains after one quantity is subtracted from another." Hence, unless further qualified, the "difference" is the number by which one quantity is greater or less than another or the number that remains after one quantity is subtracted from another. Herein, the number by which the initial

contract rent exceeds a comparable rent and the number that remains when the comparable rent is subtracted from the contract rent would be a dollar amount rather than a percentage figure. The determination of a percentage difference would require an additional calculation after calculating the dollar difference. The dollar difference must be transformed into a percentage by dividing the dollar difference by the comparable rent. In other words, when one calculates the percentage difference, one calculates the percentage, not the number, by which one rent exceeds the other. Thus, the "difference" and the "percentage difference" are two distinct calculations, and where the difference in rents rather than the percentage difference is referenced, the difference should be expressed in dollars.[7]

B.

Plaintiffs argue that when one looks beyond the wording of the proviso in the overall limitation and focuses on the other portions of the statute and on HUD's practice in establishing the initial difference, the parties' intent to carry forward the difference in rents as a percentage difference becomes apparent. As to the statute, Section 1437f(c)(1) provides that initial contract rents may not exceed fair market rents by more than 10 or 20 percent, depending upon

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[7]Because "the extent [of] differences [in rents]" ordinarily refers to dollar differences, the court would expect that parties who intend that a difference be calculated as a percentage would so specify. Here, the parties did not. Indeed, in Section 1.9(b), the HAP contracts make clear that automatic annual adjustments are determined by applying factors, the AAAFs. (The AAAFs are factors because the AAAFs must be multiplied by the contract rents in order to arrive at the adjusted rents.) Plaintiffs analogously paint the "extent [of the rent] differences" as requiring the use of a factor, *i.e.*, a percentage, but Section 1.9(d) contains no equivalent indication that a factor is involved.

the type of project.[8] But to state that the ceiling for contract rents is a certain percentage above fair market rents certainly is not to say that once the contract rents are set at a particular dollar amount below that ceiling, the difference between the contract rents and comparable rents should thereafter be calculated as a percentage difference.

Turning next to HUD's practice in establishing the initial difference, HUD has periodically published handbooks describing Section 8 program procedures, including the calculation of initial contract rents. Although the handbooks have changed over time, for at least a substantial period, HUD calculated the initial contract rents for many Section 8 units by making percentage adjustments to the rents charged for comparable unassisted units. For example, the HUD handbook in effect in 1976 granted the project owner up to three 5 percent upward adjustments to comparable rents to compensate, respectively, for (1) enhancement in rental values attributable to special amenities and design

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[8] Section 1437f(c)(1) provides, in pertinent part:

An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental (A) by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a housing strategy as defined in section 12705 of this title . . . .

This 10 or 20 percent limit has been in effect since Section 8 was first enacted. *See* Housing and Community Development Act of 1974, Pub.L. No. 93-383. § 201, 88 Stat. 633, 663 (1974).

features included in elderly/handicapped units, (2) additional burdens of managing where 100 percent of the units are assisted, and (3) payment of mortgage discounts where HUD-insured financing is used or higher debt service payments where conventional financing is used.[9] Plaintiffs argue

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[9]The HUD handbook effective in 1976 provided, in pertinent part:

i. *Special Adjustments.* The overall effect of the three adjustments described in subparagraphs (1), (2) and (3) below is to permit the approval of Contract Rents which exceed normal comparability....

(1) An upward adjustment of 5% shall be made to reflect the enhancement in rental values attributable to the special amenities and design features included in Elderly/Handicapped Units....

(2) If 100% of the revenue-producing dwelling units of a Section 8 project are planned to be assisted, an upward adjustment of 5% shall be made to compensate for the additional burdens of managing an all subsidized rental housing project....

(3) An upward adjustment of 5% shall be made to compensate for the payment of mortgage discounts when HUD-insured financing is used or to compensate for the higher debt service payments that generally must be paid to obtain conventional mortgage loans when conventional mortgage loan financing is used....

HUD Handbook 7420.1 CHG, ch. 9, at 9-13 to 9-14 (Nov. 1976).

The HUD handbook in effect in 1978 changed the percentages allowed but retained this basic structure, as follows:

(9-3i) *Special Adjustments to the Comparable Rent*

(1)(i) The following adjustment is intended to compensate for the increased security services and higher costs of owning and maintaining assisted *family* housing, and for both the additional management costs and costs for additional amenities and design features, such as ramps and grab bars, which are required in units planned for *elderly/handicapped* occupancy.

(a) For all assisted units in projects which are not HUD-insured, a 10% adjustment shall be made.

(b) For all assisted units in HUD-insured projects in which 100% of the revenue producing units are assisted, a 10% adjustment shall be made.

(c) For all units in HUD-insured projects in which fewer than 100% of the revenue producing units are assisted, a 5% adjustment shall be made.

* * * * *

that because the difference in the two rents at the time HUD calculated the original contract rents often was based on a percentage adjustment, the parties reasonably must have envisioned that Section 1.9(d) of the HAP contracts would carry forward this methodology in the overall limitation determinations and would require calculation of the initial difference using a percentage adjustment to comparable rents. But the HAP contracts state the contract rent as a fixed dollar amount and not as a base rent plus a percentage. While HUD may have calculated initial contract rents by making percentage adjustments to the rents charged for comparable unassisted units, before those adjustments were translated into contract rents, the percentages were first transformed into a fixed dollar amount and that dollar

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(2) An upward adjustment of 5% shall be made to compensate for the payment of mortgage discounts when HUD-insured financing is used or to compensate for the higher debt service payments that generally must be paid to obtain conventional mortgage loans when conventional mortgage loan financing is used [subject to the conditions subsequently listed in (i), (ii), and (iii) in the full text of the handbook] . . . .

HUD Handbook 7420.1 CHG, ch. 9. at 9-13 (May 1978).

The HUD handbook effective in 1981 was revised to allow a 10 percent adjustment for all Section 8 projects subject to a "rent reasonableness" test. The 1981 handbook provided, in pertinent part:

k. *Limitation on Rents Including Cost Justification.* The rent reasonableness test in the previous revisions of this Handbook allowed reasonable rents in Section 8 projects to exceed rents for comparable unassisted units by up to 15 percent without cost justification of any kind . . . and by an additional 5 percent with cost justification. Now, the reasonable rents may exceed comparable rents by up to 20 percent but where the owner's proposed rents exceed the comparable rents, an additional test of rent reasonableness must be made by the Section 8 Rent Formula for Assisted Units . . . . [T]he rent formula will limit the reasonable rent to that necessary to pay for vacancy, operating expenses and reserves, debt service on the mortgage, and for profit motivated owners, provide a 6% return to equity on projects for elderly families, or a 10% return to equity on projects for non-elderly families.

HUD Handbook 7420.1 REV-1, ch. 9, at 9-4 to 9-5 (Feb 1981).

amount was then added to the comparable rents to produce the contract rent. Therefore, simply because the parties anticipated that HUD may calculate initial contract rents by using percentage adjustments to comparable rents does not mean that the parties also anticipated that when applying the overall limitation, the initial difference between the contract rents and comparable rents would be a percentage difference rather than a dollar difference[10] Hence, the various handbook provisions issued by HUD are consistent with the wording of Section 1.9(d) of the HAP contracts which, as described above, anticipate that the initial difference is a fixed dollar amount.

C.

Next, plaintiffs argue that interpreting the initial difference as a flat dollar amount would improperly preclude plaintiffs from receiving compensation for reasonably foreseeable, inflation-related increases in the cost of operating Section 8 projects. As explained above, under the 1976

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[10]This conclusion is buttressed by the provision in certain of the HUD handbooks authorizing HUD to establish an initial contract rent that is greater than the rent resulting from application of the percentage adjustments when such a higher rent is proposed by the contractor and is determined by HUD to be "reasonable" though somewhat higher than HUD's estimates of comparability. *See, e.g.*, HUD Handbook 7420.1 CHG, ch. 9, at 9-13 (Nov. 1976). Where an initial contract rent is established based on such a determination that a proposed rent is "reasonable" and not by using a percentage calculation, there would seem to be no sound analytical basis for contending that the initial difference nevertheless should be calculated as a percentage. But if HAP contract holders whose initial contract rents were based on such a "reasonableness" determination are necessarily limited to a fixed dollar difference, then so too should HAP contract holders whose rents instead were calculated using percentage adjustments. It is not apparent why Congress or HUD would have intended to treat the two types of HAP contract holders differently and thereby discriminate so significantly against one class.

HUD Handbook, HUD granted adjustments to comparable rents of up to 15 percent to compensate project owners for the additional costs associated with operating Section 8 projects (the 1978 HUD Handbook granted similar adjustments up to 15 percent). Plaintiffs argue that the parties to the HAP contracts reasonably must have contemplated that at least some of these additional costs, such as certain of the costs associated with managing the Section 8 projects, could be expected to increase over time due to inflation. Accordingly, if the initial difference were maintained as a fixed dollar amount rather than a percentage, then the project owners would have no assurance that contract rents would keep up with inflation-related increases in these variable costs. Plaintiffs argue that it is not reasonable to interpret the proviso in the overall limitation as permitting such a diminution of the intended benefits of the special adjustments HUD provided.

Plaintiffs' argument has considerable initial appeal. The problem with this argument, however, is that it proves too much. To interpret the overall limitation "difference" as involving a 15 percent premium over rents of comparable unassisted units when all three 5 percent adjustments are allowed would permit a project owner not only to recover periodic rent increases to compensate for inflationary increases in its variable costs, but also potentially to recover increases with respect to fixed costs for operating the Section 8 project, costs which are incurred when the units are built or when certain features are added and do not rise with inflation. For example, HUD permitted one 5 percent adjustment "to reflect the enhancement in rental values attributable to the special amenities and design features included in Elderly/Handicapped Units." The costs of these amenities and design features, such as ramps, handrails, and wide hallways, are, for the most part, fixed at the time they are installed. HUD granted another 5 percent adjustment to account for mortgage discounts and debt service payments.

Plaintiffs have acknowledged that such debt-related costs were fixed upon entry into the mortgage agreements and generally insulated from the effects of inflation. Thus, to permit plaintiffs to maintain the initial difference as a 15 percent factor could produce a windfall to plaintiffs as comparability rates increase. Such an interpretation of the initial difference could result in plaintiffs receiving rent increases that are neither justified by changes in the rental market (*i.e.*, comparability) nor by increases in plaintiffs' costs attendant to running the Section 8 projects. These windfall payments could potentially be significant in amount.[11]

Thus, each of the two proposed interpretations of the initial difference in the overall limitation would produce results that can be argued to be inequitable. On the one hand, the initial difference was established to compensate project owners for certain costs and defendant's proposed interpretation fails to permit an increase in the dollar amount of the initial difference over time to reflect increases in certain costs that were foreseeable to the parties at the time they entered the HAP contracts. On the other hand, plaintiffs' proposed interpretation would compensate project owners for such anticipated increases in costs but could result in windfall profits to the project owners. Given the ambiguous nature of this choice from a housing policy perspective, plaintiffs simply have not presented any compelling reason to conclude that the parties intended the proviso in the overall limitation to be interpreted in a

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[11] An analogous windfall would result under the 1981 HUD Handbook which provides that the original contract rents should be established to provide the project owners with a specified return on equity (6 percent on projects for elderly families and 10 percent for nonelderly families). *See supra* note 9. If the initial difference is maintained as a percentage rather than as a fixed number, the return on equity could grow beyond the stated percentages.

manner other than that consistent with its plain meaning which, as described above, is that the initial difference is a dollar amount rather than a percentage.

CONCLUSION

For the reasons set forth above, (1) this court lacks jurisdiction to consider the claims presented by those plaintiffs that entered HAP contracts with the PHAs rather than directly with HUD, (2) the overall limitation provision contained in the HAP contracts permits HUD to use comparability studies to decrease contract rents to eliminate any material differences between rents charged for assisted and comparable unassisted units, and (3) the initial difference with respect to the initial contract rents is a fixed dollar amount rather than a percentage factor.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS, FEDERAL CIRCUIT.

No. 95-5069.

NATIONAL LEASED HOUSING ASSOCIATION, AND 189 NAMED PLAINTIFFS, PLAINTIFFS-APPELLANTS,

v.

THE UNITED STATES, DEFENDANT-APPELLEE.

[FILED] Jan. 30, 1997.

Before: RICH, Circuit Judge, NIES*, Senior Circuit Judge and PLAGER, Circuit Judge.

PLAGER, Circuit Judge.

In this appeal from an adverse judgment of the Court of Federal Claims,[1] plaintiffs challenge the Government's administration of Section 8 of the United States Housing Act of 1937, as amended, codified at 42 U.S.C. § 1437f (1994). Section 8 provides government rent subsidies for low income individuals and families living in non-government-owned housing. The Court of Federal Claims, Judge Andewelt, in a series of thoroughly-considered opinions spanning a period of four years, dealt with a multiplicity of issues raised and finally concluded that plaintiffs, a large group of developers and present and former owners of rental housing projects,

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*Senior circuit Judge Nies participated at oral argument but died before the opinion was issued. The case was decided by the remaining judges in accordance with Fed. Cir. Rule 47.11.

[1] *National Leased Housing Ass'n v. United States,* 32 Fed. Cl. 762, 765 (1995).

were not entitled to the relief they sought. On appeal, plaintiff-appellants, now consisting of the National Leased Housing Association and 189 named individuals and organizations, present six issues for decision.[2] Before addressing the several contentions raised by appellants, we give a summary of the lengthy history of the case.

BACKGROUND

A.

This case originated in the late 1980's, when the Court of Federal Claims consolidated several cases pending in that court because of the common issues presented.[3] As noted, the instant appeal is on behalf of 190 plaintiffs (collectively referred to herein as "plaintiffs" or "appellants"). Each of the plaintiffs is a current or former owner of privately owned rental properties. Each entered into a long-term Housing Assistance Payment Contract ("HAP contract") to provide subsidized housing to low-income tenants pursuant to the provisions of Section 8. Some of the plaintiffs contracted directly with the federal Department of Housing and Urban Development ("HUD") while some, subject to the approval of HUD, contracted with a local public housing agency ("PHA"), which itself had contracted with HUD.

Congress in 1974 enacted Section 8 in order to aid "low income families in obtaining a decent place to live."

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[2]The Government in its brief on appeal identifies nine separate issues for decision. Since the Government did not cross-appeal, we will confine ourselves to deciding the issues raised by appellants.

[3]The present case consists of four separate cases filed in the court of Federal Claims: No. 6-87C — filed on January 9, 1987; no. 324-87C — filed June 4, 1987; no. 204-88C — filed March 29, 1988; and no. 90-6C — filed January 2, 1990. Case no. 6-87C was designated the lead case, presumably since it was the furthest along, and all others were consolidated therewith in response to plaintiffs' motion to consolidate.

42 U.S.C. § 1437f(a) (1994). Under Section 8, tenants make rental payments according to their income and ability to pay and HUD (or the PHA as the case may be) makes up the difference between that payment and a "contract rent" specified by the HAP contract. This contract rent, as adjusted from time to time as required by Section 8, therefore determines the amount of rent the landlord is due. It is the manner in which this contract rent, once established, is adjusted that is the subject of these disputes.

The contract rent is initially set by HUD to approximate the fair market value of the rental property for the local area (called "Fair Market Rentals" or "FMRs"). To establish the FMR, HUD conducts a survey of at least 12 recently constructed projects within the relevant market area. HUD sets the FMRs by determining the 75th percentile of comparable rent levels for that area and then trends the rent data ahead two years to reflect anticipated changes in those levels. *See National Leased Housing Ass'n v. United States,* 22 Cl.Ct. 649, 656-7 (1991) (describing the initial rent determination process). The initial contract rent, however, is not necessarily set equal to the FMR. Modest adjustments may be made in the initial contract rent to reflect additional costs, such as the provision of facilities for handicapped or elderly tenants, associated with complying with Section 8 requirements. *See* 42 U.S.C. § 1437f(c)(1)(1994).

Once the initial contract rent is set, HUD is required to adjust at least annually the maximum monthly rents for units covered by the contracts. The statute provides:

> The assistance contract shall provide for adjustments annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

Section 8(c)(2)(A), 42 U.S.C. § 1437f(c)(2)(A) (1994).[4]

This annual adjustment requirement of Section 8 is implemented through a provision in the HAP contracts referred to as Section 1.8b. That section provides:

> (b) *Automatic Annual Adjustments.*
>
> (1) Automatic Annual Adjustment Factors ["AAAFs"] will be determined by HUD at least annually; interim revisions may be made as market conditions warrant. Such Factors and the basis for their determination will be published in the Federal Register. These published Factors will be reduced appropriately by HUD where utilities are paid directly by Families.
>
> (2) On each anniversary date of the Contract, the Contract Rents shall be adjusted by applying the applicable [AAAF] most recently published by the Government. Contract Rents may be adjusted upward or downward, as may be appropriate; however, in no case shall the adjusted rents be less than the Contract Rents on the effective date of the Contract.[5]

The AAAFs are set by HUD based upon certain broad economic indices, the Consumer Price Index and the Bureau of the Census American Housing Surveys. There is an AAAF for each of four census regions, the States of Alaska and Hawaii, and seventy two metropolitan areas. *See generally National Leased Housing Ass'n v. United States,* 22 Cl.Ct. 649, 657 (1991).

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[4]The language of the statute at the time the contracts were entered into was essentially the same. Therefore we will refer to the current version of the statute.

[5]This is from a 1976 version of the HAP contract. In 1980 a different version of the contract was used. These differences, however, are not significant for purpose of the present discussion.

There are limits, however, to these adjustments. The statute provides for the following limitation:

> Adjustments in the maximum rents . . . . shall not result in material differences between the rents charged for assisted and comparable unassisted units as determined by the Secretary.

Section 8(c)(2)(C), 42 U.S.C. § 1437f(c)(2)(C) (1994). Consistent with this, the HAP contracts also provide an "Overall Limitation" section that implements, and tracks in part the language of, this section of the statute. Section 1.8d of the HAP contract provides:

> d. *Overall Limitation.* Not withstanding any other provisions of this Contract, adjustments as provided in this Section shall not result in material differences between the rents charged for assisted and comparable unassisted units, as determined by the Government; provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents.

It is this last contract section that is at the heart of the present controversy.

B.

About 1981 HUD began to suspect that in some areas the AAAF adjusted rents were outpacing rents for comparable unassisted units. Prior to that time HUD routinely had been granting the full AAAF adjustment each year. In order to bring the contract rents back in line with those for comparable rents HUD began selectively conducting comparability studies to determine the prevailing rent for comparable unassisted units. HUD then used the results of these studies to cap the rents paid to affected Section 8 owners, relying on

the authority of the Overall Limitation provision in section 1.8d of the contracts. Not surprisingly, the owners were not pleased with this change, and this suit to determine the validity of the process arose.

This suit, though a case of first impression in this court, was not the first to address the issues raised. The first case out of the box was decided by the Ninth Circuit in 1988. In *Rainier View Assocs. v. United States,* 848 F.2d 988 (9th Cir. 1988), that court held that subsection (c)(2)(A) of Section 8, the subsection quoted above, gave HUD two options. One was to base the periodic adjustments to contract rents on actual changes in the housing market through market surveys; the other was to base them on a "reasonable formula." Since HUD, by adoption of the AAAFs as provided in section 1.8b of the HAP contracts, had indicated its intention to use a formula approach, it could not later change its mind and use surveys as a basis for adjusting the rents. *Id.* at 991. Accordingly, capping the rents paid to the landlords based on actual market surveys was held unlawful. The landlords were deemed to be due the full amounts authorized by the AAAFs. The Supreme Court denied certiorari. *United States v. Rainier View Assocs.,* 490 U.S. 1066, 109 S.Ct. 2065, 104 L.Ed.2d 630 (1989). In response, the Government announced its intention not to honor the position of the Ninth Circuit outside that circuit; and this litigation proceeded apace.

Plaintiffs in their case before the Court of Federal Claims stood essentially on the position taken by the Ninth Circuit. Meanwhile, the issue of whether HUD could base its rent adjustments on both AAAFs and, when thought necessary, market surveys of the local area, or whether the contracts required HUD to utilize only the formula method, finally made it to the Supreme Court in 1993 in another case from the Ninth Circuit, *Alpine Ridge Group v. Kemp,* 955 F.2d 1382 (9th Circ. 1992), *rev'd sub nom. Ciscernos v. Alpine*

Ridge Group, 508 U.S. 10, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). But that gets us ahead of the story of this appeal. For that story we turn to the series of decisions below, out of which this appeal comes.

(1) NLHA I

In the first of its four opinions, *National Leased Housing Ass'n v. United States*, 22 Cl.Ct. 649 (1991) *(NLHA I)*, the Court of Federal Claims (then the United States Claims Court[6]) considered the Government's contention that Section 801 of the Department of Housing and Urban Development Reform Act of 1989 ("HUD Reform Act"), Pub.L. No. 101-235, 103 Stat. 2057, repealed that court's jurisdiction under the Tucker Act. The Tucker Act grants the Court of Federal Claims jurisdiction over contract suits against the United States. *See* 28 U.S.C. § 1491. Section 801, enacted in 1989 in large part in response to the Ninth Circuit's decision in *Rainier View*, explicitly provides that HUD, after issuing appropriate regulations, can conduct comparability studies as part of the process of periodic adjustment of the contract rents. 42 U.S.C. § 1437f(c)(2)(C) (1994).

In an apparent attempt to mollify the landlords, section 801 also provided a limited damages provision for those owners whose contract rents had been reduced in the past by the use of comparability studies. The damages provision entitled the property owners to 30% of the difference between the contract rent paid and the full AAAF adjusted rent. *Id.* The Government argued that Section 801 "represents a precisely drawn, detailed statute" that replaced the judicial remedy provided by the Tucker Act, and thus impliedly repealed the Court of Federal Claims' jurisdiction under that Act. The court rejected the argument. Rather,

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[6] *See Court of Federal Claims Technical and Procedural Improvement Act of 1992*, Pub.L. 102-572, 106 Stat. 4516 (changing the court's name to the Court of Federal Claims).

the court concluded, Section 801 was intended merely as a formula to calculate, and limit, damages under the statute. Accordingly, the court denied the government's motion to dismiss for lack of jurisdiction.

The trial court preliminarily considered the central issue in the case, whether, independent of section 801, HUD had the right to modify the periodic rent adjustments dictated by the AAAFs based on the results of comparability studies. (The issue of whether the 1989 amendment could constitutionally apply to pre-existing contracts was being separately litigated in the Ninth Circuit's *Alpine Ridge* case.) The trial court concluded that the "Overall Limitation" provision contained in section 1.8d of the HAP contracts, quoted above, gave HUD such power. *NLHA I,* 22 Cl.Ct at 656. In reaching this conclusion the trial court expressly disagreed with the Ninth Circuit's reading of the same provision in *Rainier View.*[7]

(2) NLHA II

Having failed in their attempt to challenge HUD's ability to use comparability studies, the plaintiffs mounted three procedural challenges to HUD's use of those studies. In its second opinion, the Court of Federal Claims considered and rejected each of these procedural challenges. *National Leased Housing Ass'n v. United States,* 24 Cl.Ct. 647 (1991) *(NLHA II).*

The plaintiffs argued below that the procedures used to conduct and implement the comparability studies violated the Due Process and Equal Protection clauses of the Consti-

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[7] The Court of Federal Claims left open the question of whether the government was precluded from relitigating this issue based on the results in *Rainier View.* This issue was mooted by the Supreme Court's decision in *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993) [hereinafter *Alpine Ridge*].

tution, the Administrative Procedure Act ("APA"), and the Freedom of Information Act ("FOIA"). Realizing that the Court of Federal Claims cannot adjudicate these claims directly, plaintiffs couched their claims as one of breach of contract rather than a violation of these clauses and statutes directly. In essence, they argued that HUD was contractually obligated to comply with the APA, FOIA, and with the requirements of Due Process and Equal Protection in making its adjustments. Failure to do so produced a breach of contract for which plaintiffs were entitled to relief. *NLHA II,* 24 Cl.Ct. at 650-651.

The trial court first addressed what, if anything, would be the plaintiffs' damages assuming they could make out a breach of contract on one of these grounds. The plaintiffs contended that they were entitled to the full AAAF adjusted rents and, therefore, their damages would be the difference between the actual rents paid and the full AAAF adjusted rents. That was the solution employed in the Ninth Circuit. *See Alpine Ridge Group v. Kemp,* 764 F.Supp. 1393, 1403 (W.D.Wash. 1990) (court ordered HUD to "pay plaintiffs the AAAF rents wrongfully withheld"). The trial court rejected this conclusion. Instead, the court concluded that the plaintiffs are entitled only to rents that do not materially differ from those of comparable unassisted units. *NLHA II,* 24 Cl.Ct. at 651.

The trial court then considered each of the procedural requirements individually. The court held that there was no due process violation because of the availability of post-adjustment procedures to challenge the comparability studies, and found that HUD was not contractually obligated to comply with the APA or FOIA under contracts entered into prior to August 1980.[8] Further, the court summarily dis-

[8] The court requested further briefing on the issue of whether the APA or FOIA applies to post-August 1980 contacts. *NLHA II,* 24

missed an equal protection challenge on the ground that selective enforcement does not amount to impermissible discrimination. *NLHA II,* 24 Cl.Ct. at 652-8.

(3) NLHA III

The plaintiffs fit into one of two categories: those who contracted directly with HUD to provide Section 8 housing and those who contracted directly with a local public housing authority. The Government moved to dismiss the claims brought by those plaintiffs who contracted with a PHA, and not directly with HUD, on the ground that the Court of Federal Claims lacked jurisdiction under the Tucker Act because there was no privity of contract between those contract claimants and the United States Government. The plaintiffs responded that the PHAs were, for purposes of these contracts, agents of the Federal Government, and on basic agency principles the Government was liable to plaintiffs.

In the third of its four decisions, the court ruled that the two tier structure, in which the Government contracted with the PHAs and the PHAs contracted with the plaintiffs, insulated the Government from suit by the plaintiffs. *National Leased Housing Ass'n v. United States,* 32 Fed. Cl. 454, 471 (1994) *(NLHA III)*. In reaching this conclusion the court relied on cases in this court and in its predecessor court dealing with the analogous situation of contracts for development of publicly-owned low income housing, in which the same two tier structure was utilized, and regarding which the courts had held there was no privity of contract between the developers and the Government. The trial court also rejected the plaintiffs' arguments that these property owners were "third party beneficiaries" of the HUD-PHA contracts, which contracts when approved by

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Cl.Ct. at 658. Section 4, *infra,* discusses the court's treatment of the post-August 1980 contracts.

the Government authorize the PHAs to enter into the HAP contracts with the property owners.

The court also considered two more issues, both of which are here on appeal. The first is whether the "Overall Limitation" gives HUD the authority to reduce rents below the prior year's contract rent based on the results of the comparability study. Plaintiffs argued that the Overall Limitation provision only gave HUD the power to reduce the present year's "adjustment," not independently cap rents at that level dictated by the comparability study when that cap was below the prior year's contract rent. The court rejected that argument. *NLHA III,* 32 Fed. Cl. at 464-5.

The other issue addressed in *NLHA III* concerned the proper interpretation of the proviso in the Overall Limitation provision that states: "provided, that this limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences existed with respect to the initial Contract Rents." Plaintiffs contended that this provision required HUD to maintain a *percentage* differential between the contract rent and the comparable unassisted rents, as determined by the comparability studies, while the Government argued that the difference should be measured in dollar terms.

To illustrate, if the initial contract rent was $500 and the rent of a comparable unassisted unit was $400, the plaintiffs argued that HUD in any future adjustment must maintain a 25% difference (*i.e.,* ($500 - $400) / $400 = 25%) between the adjusted contract rents and the rent of comparable unassisted housing. In contrast, the Government argued that the initial difference is a fixed dollar amount. Thus, in the example, HUD must simply maintain a $100 difference (i.e., $500 - $400 = $100) between the adjusted contract rent and the rent of comparable unassisted housing. Over time, and as rents increase significantly, the difference

between the rent due an owner under the plaintiffs' theory of how to measure "difference" and the Government's could be quite sizable. For various reasons the trial court found the meaning of the term "difference" as used in the contract to be more likely the meaning preferred by the Government, *NLHA III*, 32 Fed. Cl. at 468, and so held.

(4) NLHA IV

In its final opinion, *National Leased Housing Ass'n v. United States,* 32 Fed. Cl. 762, 765 (1995) *(NLHA IV)*, the Court of Federal Claims revisited an issue deferred in *NLHA II*. That issue was whether the post-August 1980 contracts required HUD to comply with certain rulemaking and publication requirements pursuant to Section 1.1(g) of the HAP contract. That section now provided:

> Neither party is bound by any representations or agreements of any kind except as contained in this Contract, *any applicable regulations,* and agreements entered into in writing by the parties which are not inconsistent with this Contract.

(Emphasis added).

The pre-August 1980 contracts did not include the "any applicable regulations" limitation. The plaintiffs argued that the addition of the "any applicable regulations" language meant that HUD intended to include as part of the contracts the specific requirements found in two general regulations that governed HUD's administrative activities, found in 24 C.F.R. §§ 10.1 and 15.11. The former requires "notice and comment" procedures for all "HUD programs and functions, including matters that relate to public property, loans, grants, benefits, or *contracts,*" 24 C.F.R. § 10.1 (1988) (emphasis added), while the latter requires publication in the Federal Register of "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability," 24

C.F.R. § 15.11 (1988). That court rejected such a broad reading of the clause. The court noted that on page one of the contracts there was provision for the contracting parties to select from a list of regulatory schemes ("New Construction" (Part 880), "Substantial Rehabilitation" (Part 881), and "State Housing Agencies" (Part 883)). The court ruled that the "any applicable regulations" provision in the contract referred only to the regulations governing those specific programs.

Since there were no remaining issues to be decided, and the parties agreed that summary judgment was appropriate, the Court of Federal Claims gave final judgment for the Government. This appeal followed.

DISCUSSION

As noted, not all of the many issues involved in understanding the case and that were decided by the trial judge are before us. The plaintiff-appellants raise six issues on appeal. These six are: (1)whether their due process rights were violated by the way the Government proceeds to make these periodic rent adjustments; (2) in making them, whether the Government was obligated to comply with the APA and FOIA; (3) whether the Government, under any theory of the contract provisions, in making an annual adjustment could lower rents below that of the preceding year; (4) whether the "differences" that must be maintained under the proviso in section 1.8d of the contracts is measured in dollars or in a percentage; (5) the proper measure of damages for the Government's breaches; and (6) whether there is privity of contract with the Government for those who contracted through a PHA. In view of our disposition of the other issues, it is unnecessary for us to reach the fifth issue raised, that of the proper measure of damages. The other issues will be addressed *seriatim*.

(1) Due Process

Appellants argue that property owners under these HAP contracts have the right to receive a factor-based rent adjustment, this is, the adjustment authorized by the AAAFs in the absence of a legally valid comparability study indicating otherwise. Since in appellants' view the comparability studies utilized by HUD are so "procedurally invalid" — by which it would appear they mean poorly done — as to be legally null and void, any adjustment based on these studies is a denial of the property owners' due process rights.

The Government responds with a two-part argument. First, the property right of these plaintiffs is not to a rent adjustment based on the AAAFs, but only to a rent adjustment that gives them a rent not materially different than the rent charged for comparable unassisted units. Second, procedural due process requires that some form of hearing be granted before an individual is finally deprived of a property interest, but that the particular form of hearing is a matter open to considerable administrative flexibility. In the case of these landlords, ample opportunity exists for property owners to secure review of the periodic rent increases through existing procedures in HUD, and, if not satisfied, ultimately through appeal to the courts. Furthermore, argues the Government, the demand by appellants that there be detailed, nationwide standards for these studies is unwarranted in view of the standards already incorporated in the statute.

[1] It is difficult to know what, if anything, is left of plaintiffs' due process argument at this stage of the case. At the time it was first presented to the Court of Federal Claims, and ruled on by that court in 1991 *(NLHA II)*, the plaintiffs had going for them the decision by the Ninth Circuit in *Rainier View*. Furthermore, they had two district court decisions holding unconstitutional as a violation of the

property owners due process rights Congress' attempt in the 1989 amendment to Section 8 to authorize such comparability studies.[9] In 1992, the Ninth Circuit reaffirmed its holdings regarding the unavailability under the contracts of comparability studies for rent adjustment and affirmed the district court's holdings that the 1989 amendment to the HUD Act was a violation of the property owners' due process rights. *Alpine Ridge Group v. Kemp,* 955 F.2d 1382 (9th Cir. 1992).

The Supreme Court, on certiorari in *Alpine Ridge Group v. Kemp,* 955 F.2d 1382 (9th Cir. 1992), took a quite different view. *Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993). The Court read the Overall Limitation provision of the contract, subsection 1.8d, set out above,[10] to require expressly that contract rents not be adjusted so as to exceed materially the rents charged for comparable unassisted units on the private rental market, even if other provisions of the contracts might seem to require such a result." *Id.* at 18-19, 113 S.Ct. at 1903. As a consequence, the Court found no fault with HUD's use of comparability studies as a check against the corrective for the AAAF-driven adjustments. As the Court put it, the Ninth Circuit's reading of these contract provisions was "almost precisely backwards." *Id.* at 19, 113 S.Ct. at 1903.

In *Alpine Ridge* the Court addressed plaintiffs' argument that they were deprived of their due process rights by saying, "[w]e begin our analysis of respondents' due process claim

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[9] *Acacia Villa v. Kemp,* 774 F. Supp. 1240, 1251 (C.D.Ca.1990); *Alpine Ridge Group v. Kemp,* 764 F. Supp. 1393, 1403 (W.D.Wash.1990).

[10] The Supreme Court referred to this subsection as 1.9d, rather than 1.8d. This is because the contracts actually used place the provision in section 1.9, whereas the illustrative contract before the Court of Federal Claims had it in section 1.8. To be consistent with the opinions below, we have used the 1.8 reference.

with the assistance contracts. Because we find that those contracts do not prohibit the use of comparability studies to impose an independent cap on the formula-based rent adjustments, our analysis ends there as well." *Id.* at 17, 113 S.Ct. at 1902-03. The trial judge in the case before us was prescient in earlier ruling that, contrary to the Ninth Circuit's view, the contracts did authorize the comparability studies, and thus their use was not a denial of these plaintiffs due process rights. Given the Supreme Court's view of plaintiffs' due process argument, there seems little more to be said, beyond stating our agreement with the trial court's conclusion on this issue. Our sister circuits who have considered this issue since *Alpine Ridge* agree. *See Federal Housing Partners IV v. Cisneros,* 55 F.3d 362, 368 (8th Cir. 1995), *cert. denied,* ____ U.S. ____, 116 S.Ct. 474, 133 L.Ed.2d 403 (1995); *Sheridan Square Partnership v. United States,* 66 F.3d 1105 (10th Cir. 1995).

At bottom, plaintiffs complaint here, as it was in *Alpine Ridge,* appears to be a complaint about the quality and technical soundness of the individual comparability studies used as the basis for particular rent caps. The effect to impose a generally applicable constitutional bar against such studies must fail, since the contracts specifically authorize them. That is not to say that plaintiffs are wholly at the mercy of arbitrary government action. As the Supreme Court noted in the *Alpine Ridge* case, "[I]f respondents have been denied formula-based rent increases based on shoddy comparisons, their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons." *Id.* at 20-21, 113 S.Ct. at 1904. This litigation involves no such particularized challenge.

(2) The APA and FOIA

[2] Appellants contend that HUD is also required to comply with the rulemaking procedures set forth in the Administrative Procedure Act, 5 U.S.C. §§ 551 and 553,

and the disclosure requirements of the Freedom of Information Act, 5 U.S.C. § 552, in conducting their comparability studies. According to appellants, failure to do so rendered these studies "null and void." Appellants suggest that they are not suing for violation of these statutes as such, which they cannot given the forum. They also do not contend that HUD's failure to comply with these provisions resulted in a breach of contract *per se.* Instead, appellants sue on the breach of contract that occurred when HUD paid less than the AAAF-adjusted rents, in reliance on procedurally defective studies.

To reach appellants' argument requires examining its premises. The first is that the APA and FOIA apply at all to these contracts. Appellants contend that they do based on Section 1.1(g) of the HAP contract, which provides:

> Scope of Contract. This Contract, including exhibits, whether attached or incorporated by reference, comprises the entire agreement between the Owner and HUD with respect to the matters contained in it. Neither party is bound by any representations or agreements of any kind except as contained in this Contract, any *applicable regulations,* and agreements entered into in writing by the parties which are not inconsistent with this Contract.

(Emphasis added.) Appellants seize on the "any applicable regulations" language in this section to conclude that HUD is required to comply with the general requirements contained in 24 C.F.R. §§ 10.1 and 15.11.[11] As explained

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[11]The emphasized language only appears in the post-August 1980 HAP contracts. Prior HAP contracts did not include this language. Although appellants argued below that HUD was required to comply with the APA and FOIA even in the pre-August 1980 contracts, in relying exclusively on this language here they appear to have abandoned the pre-August 1980 contracts. Given our view of the applicability of the

earlier, the former regulation tracks certain notice and publication requirements of the APA and the latter those of FOIA. In essence, appellants contend that the requirements of these regulations were incorporated by reference into the HAP contract.

The next premise in appellants' argument is that the standards and procedures used by HUD to implement the comparability studies were "substantive rules" under the APA since these standards relate to the "approval or prescription for the future of rates, wages, . . . prices, . . . or of valuation, costs, or accounting, or practices bearing on any of the foregoing." 5 U.S.C. § 551(4). Therefore, these standards and procedures should have been subjected to the "notice and comment" procedures of the APA. In like manner, they argue that the guidelines used to conduct the comparability studies are subject to the publication provisions of FOIA because they are "substantive rules of general policy or interpretations of general applicability formulated and adopted by the agency . . ." 5 U.S.C. § 552(a)(1)(D). Thus, even if the APA notice and comment procedures were not applicable, the FOIA requirements do apply under this more liberal definition.

Assuming that these provisions apply, appellants conclude that HUD's failure to comply rendered the resulting studies "null and void." it is not clear on what authority they rest this proposition for a violation of the APA since appellants cite none. For a violation of FOIA, however, they cite to FOIA itself.[12] Since, it is argued, HUD was required to and

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regulations to the post-1980 contracts, it is unnecessary for us to address the question of the pre-1980 contracts.

[12]"Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published," 5 U.S.C. § 552(a)(1); *see also* 24 C.F.R. § 15.11.

yet did not comply with the APA and FOIA provisions in conducting the comparability studies, they could not adjust the contract rents based on the results of these invalid studies. Having done so, they breached their contractual duty under the HAP contracts.

Appellants' contend that their remedy for such a breach is the full AAAF adjusted rents "under the two-step mechanism enunciated by *Alpine Ridge.*" In addition, appellants rely on an internal HUD memo of Thomas T. Demery, Assistant Secretary for Housing, dated June 30, 1987, as well as Section 142(c)(2)(B) of the Housing and Community Development Act of 1987, Pub.L No. 100-242, 101 Stat. 1815, 1850 (1988) (codified at 42 U.S.C. § 1437f(c)(2)(C) (1988). That memo instructs HUD field offices to award the full AAAF adjustment in the event that they have not completed comparability studies within two months after a self-imposed internal deadline. The 1988 amendment similarly requires a full AAAF adjustment if a comparability study is not completed within 60 days from the anniversary date of the HAP contract.

The Government attacks each of the premises in appellants' syllogism. As argued successfully below, the Government contends that the provision in the HAP contracts was never intended to, and does not, obligate HUD to comply with either the APA or FOIA. Second, they strenuously object to the characterization of their internal memoranda or procedures as meeting the test of a "substantive rule" or "general policy statement" that would bring these documents within the purview of those statutes. Further, should this court reach the issue, argues the Government, the question should be remanded to permit the lower court to consider fully the legal effect of these documents since the lower court did not reach this issue. In response, appellants argue that this is purely a legal question that we are free to decide on the record before us.

As previously stated, the trial court ruled in *NLHA IV*, 32 Fed. Cl. at 767, that the "any applicable regulations" clause in the post-August 1980 version of the HAP contract does not incorporate Sections 10.1 and 15.11 of HUD's general regulations. The court based its conclusion on the "four corners of the contract document." The HAP contract was made generic in nature to cover several different types of Section 8 programs. Each program corresponded to a different part of the HUD regulations. Each of these parts included a host of regulations governing the particular type of program. In particular there were three applicable parts listed on the HAP contract: "Part 880" — "Section 8 Housing Assistance Payments Program for New Construction," 24 C.F.R. pt. 880; "Part 881" — "Section 8 Housing Assistance Payments Program for Substantial Rehabilitation," 24 C.F.R. pt. 881; or "Part 883" — "Section 8 Housing Agencies," 24 C.F.R. pt. 883. *See NLHA IV*, 32 Fed. Cl. at 764. The contracting parties would then check a box next to one of these parts to indicate which type of Section 8 program was involved. The trial court concluded that the "any applicable regulations" language was meant to incorporate the regulations included within the selected "Part," but not the general APA or FOIA regulations.

We have examined the contracts and find them as described by the trial court. The court's plain meaning approach makes eminently good sense. We note further that there has been a long-running debate in the administrative law community over exactly what type of government documents and decisional events fall within the requirements of notice-and-comment rulemaking under the APA and its counter-parts in FOIA.[13] It seems unlikely that HUD

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[13] Courts and commentators alike have struggled to define the reach of the APA, describing the line separating those documents covered by the APA and those that are not as "fuzzy," "blurred," "enshrouded by smog," and "baffling." *See Community Nutrition Institute v.*

would have intended to incorporate into these contracts all its general regulatory provisions without limitation, particularly at a time before the internal procedures and practices at issue were considered necessary. Moreover, we conclude that even if these statutes applied, appellants would not be entitled to the full AAAF-adjusted rent for there is no such presumptive "two-step mechanism" found in *Alpine Ridge*. *See Federal Housing Partners IV*, 55 F.3d at 368 ("We do not see how a failure to follow APA procedures could have given rise to a property right to AAAFs unqualified by comparable local rents, a result necessarily contrary to the contracts, the statute, and [*Alpine Ridge*]."") Having found no error in the trial court's interpretation of the contracts, it is affirmed.

(3) Reduction in Existing Rents

[3] Appellants content that HUD breached the HAP contract by using comparability studies to reduce pre-existing rents as opposed to limiting future annual adjustments. They argue that both the statute and the contract refer to limiting the "adjustments" and not the contract rents. Appellants admit, as they must under *Alpine Ridge*, that HUD has the power to adjust contract rents to ensure that they do not materially exceed the rent for comparable unassisted units, but appellants argue that that power applies only to reductions in the current annual adjustment dictated by the AAAFs.

Young, 818 F.2d 943 (D.C. Cir. 1987) (per curiam) (*citing Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C. Cir. 1994); Kevin W. Saunders, *Interpretive Rules with Legislative Effects: An Analysis and a Proposal for Public Participation*, 1996 Duke L.J. 346, 352; *Noel v. Chapman*, 508 F.2d 1023, 1030 (2d Cir. 1975); respectively, *see also* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like — Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1321 (1992); 2 K. Davis, *Administrative Law Treatise 32* (2d ed. 1979).

Appellants argue that modifying the AAAF is the exclusive means to reduce the rents below the previous year's contract rent, i.e., a negative AAAF. This argument was considered and rejected by the Supreme Court. The Supreme Court well understood the purpose of the HUD's use of the comparability studies in referring to them as "an *independent cap* limiting the *rent payments* HUD would make under the Section 8 contracts." *Alpine Ridge,* 508 U.S. at 14, 113 S.Ct. at 1901 (emphasis added). The Court thus made clear that the comparability studies are a mechanism to ensure that the rents paid do not exceed the fair market value, i.e., a "cap." This mechanism is "independent" of the AAAFs. Moreover, it limits the "rent payments" and not merely the "adjustments" as argued by the Appellants.

In *Alpine Ridge,* the Court considered the *Rainier View* court's view that 24 C.F.R. § 888.204, which states that the agency "will consider establishing separate or revised [AAAFs] for [a] particular area," barred adjustments to contract rents independent of the published factors. Although the Court acknowledged that the regulation was consistent with this view, it concluded that while the contract allows for "adjustments factors as a means of remedying material differences in rents . . . it does not foreclose corrective adjustments *independent* of the factors." *Alpine Ridge,* 508 U.S. at 20 n. 2, 113 S.Ct. at 1904 n. 2 (emphasis added). We conclude, as did the Supreme Court, that the HAP contracts permit HUD to reduce rents below a previous year's rent by the use of comparability studies.

This conclusion is supported by common sense as well as precedent. The AAAFs are designed to provide for uniform adjustment of rents throughout a relatively large geographical area, much in the same way the cost of living allowance ("COLAs") adjust wages. The annual adjustments, however are not designed to correct past inaccuracies in the rent.

Instead they are designed to reflect the escalation in prices over the preceding year as measured by the Consumer Price Index and other generalized indices. To prevent HUD from adjusting rents downward by the use of comparability studies, thus limiting the role of comparability studies to constraining only future increases in rents, would be to allow a property owner to maintain an elevated rent level in contravention of the statute and the contract.

The point can be illustrated by the following example. Suppose that HUD assigns an initial contract rent of $500 to Owner. The next year the AAAF is 5%. Accordingly HUD increases the contract rent to $525. Assume that the following year, because of a general downturn in the economy in the general geographic area that AAAF encompasses, the AAAF is set at 1%. However, HUD conducts a comparability study regarding Owner's property and discovers that the rent for comparable unassisted housing is only $485 due to more depressed conditions in the more limited area surrounding the property. Appellants acknowledge that Owner may not be entitled to the 1% increase for that year, but under appellants view of the contracts, he would be entitled to continue to claim rent payments of $525. This cannot be a correct result, however, since there is a material difference between the contract rent and that for comparable unassisted units. [14] We conclude that this is contrary to the statute and the contract and we therefore reject appellants' interpretation. Accordingly, we affirm the lower court's ruling.

(4) Initial Difference: Fixed Dollars v. Percentage

[4] Appellants contend that HUD breached the HAP contract by paying only a fixed dollar amount versus a fixed

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[14] We assume for sake of illustration that there is no "initial difference" between the initial contract rent and the rent of a comparable unassisted unit.

percentage in order to maintain the "initial difference" between the contract rent and the rent of comparable units. Subsection 1.8(d) of the HAP contract provides that the "[overall] limitation shall not be construed to prohibit differences in rents between assisted and comparable unassisted units to the extent that such differences may have existed with respect to the initial Contract Rents." Appellants argue that this provision requires HUD to maintain the same *percentage* difference between the adjusted contract rent and the corresponding rent produced by the comparability study as existed between the initial contract rent and the rent of a comparable unassisted unit at the time of the contract. The Government contends that this initial difference should simply be the mathematical difference, expressed in dollars, between the original contract rent and the initial rental value of a comparable unassisted unit. Thus, if the original contract rent was $500 and the rent of a comparable unassisted unit was $400, HUD is required to maintain a $100 difference between the adjusted rent and the rent of a comparable unassisted unit, as determined by the comparability study. Applicants' approach would require HUD to maintain a 25% difference between the two.

The trial court interpreted this proviso to require that the mathematical difference between the two, as expressed in dollars, be maintained in subsequent years. The court considered and rejected appellants' argument that HUD's conduct in calculating the original contract rent evinced an intent to adopt appellants' interpretation. *NLHA III,* 32 Fed. Ct. at 469-70.

It should first be noted that in this context a "difference" is defined as a result of the subtraction of two numbers, which by necessity has the same units as the two numbers. *Webster's Third New International Dictionary* 628 (1986) ("the result obtained by subtracting one magnitude, number, or function from another of the same kind"). In this

case the relevant units are dollars. Thus, the initial difference between the initial contract price and the rent of a comparable unassisted unit produces a number expressed in dollars. This is the plain meaning of this term. *See Hills Materials Co. v. Rice,* 982 F.2d 514, 516 (Fed. Cir. 1992) ("wherever possible, words of a contract should be given their ordinary and common meaning.") (citation omitted).

Appellants' reading would require that the initial result (expressed in dollars) be divided by another number to produce an initial percentage difference. To apply this initial percentage difference in subsequent years, the adjusted contract rent would have to be multiplied by this initial percentage difference and the result of this calculation added to the adjusted contract rent. This injects unnecessary complexity into the contract.

Appellants' position is also contrary to the purpose of this provision. This provision permits the property owners to be compensated for the additional costs of complying with and participating in the Section 8 program. Most of these costs, such as debt service and special amenities, are fixed at the time of the contract. A fixed dollar initial difference would thus compensate the owners for these additional costs. Allowing the initial difference to escalate over time, in some instances at least, would produce a windfall for the landlord. The fact that appellants can cite to some variable costs of operating a property under the Section 8 program does not change this fact. We conclude that the trial court was correct in its understanding of how this proviso should be interpreted; accordingly, we affirm the trial court's ruling.

(5) Privity of Contract

[5] The last issue to be addressed is whether the Court of Federal Claims had jurisdiction over those owners who entered into HAP contracts with the PHAs rather than with

HUD directly. The Court of Federal Claims concluded that it did not.

Appellants put forward two bases to establish privity of contract with the United States, an undisputed prerequisite for standing to sue in the Court of Federal Claims under the Tucker Act. The first is that the PHAs acted as "agents" for the United States. Appellants cite *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983) in support of their position. In describing the rare circumstances under which a subcontractor can sue the Government directly, the court in *Johnson Controls* identified three factors that must be present in order for the subcontractor to establish privity of contract:

> The prime contractor was (1) acting as a purchasing agent for the government; (2) the agency relationship between the government and the prime contractor was established by clear contractual consent; and (3) the contract stated that the government would be directly liable to the vendors for the purchase price.

Id. at 1551 (citations omitted). The court below held that "[n]one of these factors is presented in this case." *Id.*

Appellants argue that, unlike the subcontractor in *Johnson Controls,* they can shoulder the heavy burden of satisfying all three requirements. Even assuming that appellants could satisfy the first two factors, they cannot meet the third. Appellants rely on § 216(a) of the PHA's Annual Contribution Contracts ("ACCs") with HUD to prove HUD's direct liability. These are the contracts between HUD and the various PHAs, under which the PHAs administer their contracts with those landlords who contract with the PHAs to provide Section 8 housing. The cited section of the ACC states that "HUD shall assume the [PHA's] rights and obligations under the [ACC] and/or [HAP] Contract. . . ." What appellants fail to recite, however, is the

rest of this provision, which requires HUD to assume these rights and obligations "in accordance with paragraph (b)(3) [of the ACC]." That paragraph in turn provides that "HUD *may,* if it determines the [PHA] is in default, assume the [PHA's] rights and obligations. . . ." (Emphasis Added.) Thus, HUD's liability, if any, is completely within its discretion.

This is not the type of direct, unavoidable contractual liability necessary to trigger a waiver of sovereign immunity, the inevitable result of finding privity of contract. In both the cases on which the *Johnson Controls* court relied for these three requirements, the Government liability was not contingent, nor within its discretion. In *Kirk-Limerick, Inc. v. Scurlock,* 347 U.S. 110, 74 S.Ct. 403, 98 L.Ed 546 (1954), the Navy entered into a cost-plus contract that obligated them to pay the costs incurred by the contractor. The contract between the Navy and the contractor required that "the Government *shall* be liable to the vendors for the purchase price." *Id.* at 112, 74 S.Ct. at 405 (emphasis added). Similarly, in *Western Union Telegraph Co. v. United States,* 66 Ct.Cl. 38, 1928 WL 3062 (1928), the United States could not avoid liability. There was no question that the Government was liable. *Id.* 66 Ct.Cl. at 50 ("[t]he defendant [United States] admits it is liable"). The only question was the amount of liability. *Id.* at 49.

In the case before us, the liability of the United States, if any, is contingent upon their acquiescence. This is not the direct, uncontested liability that is required to fit within this narrow exception to the general rule that the Court of Federal Claims does not have jurisdiction over sub-contractor's claims against the United States. The only authority from this court on point supports our conclusion. In *Katz v. Cisneros,* 16 F.3d 1204 (Fed.Cir.1994), a property owner who had entered into a HAP contract with a PHA sued HUD in the United States district court of Massachusetts

for, *inter alia,* breach of contract. The district court transferred the contract claim to the Court of Federal Claims. The property owner filed an interlocutory appeal with this court. The *Katz* court reversed and remanded, concluding that the Court of Federal Claims did not have jurisdiction because, *inter alia,* the property owner did not have a contract with the United States, the *"sine qua non"* of jurisdiction in the Court of Federal Claims." *Id.* at 1210.

Katz also controls over appellants' alternative theory of privity — third party beneficiary. Appellants argue that even if they are not in privity with the United States through an agency relationship, they nonetheless have privity as third party beneficiaries of the ACCs between the United States and the PHAs. The trial court concluded that the third party beneficiaries of the ACCs are the tenants and not the property owners. The *Katz* court agreed — "If there is a third party beneficiary at all, it is probably the low-income tenants," *id.,* as do we. Appellants cite no cases in which property owners have been held to be third party beneficiaries of the ACCs. The only cases cited by the Appellants bolster our conclusion that they are not.[15] The trial court correctly ruled that those plaintiffs who contracted with PHAs and not directly with HUD did not have contracts that gave them the right to sue the United States for breach.

In summary, it must be remembered that this is a breach of contract dispute. Otherwise the Court of Federal Claims, and therefore this court, would not have jurisdiction. We do

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[15] *Henry Horner Mothers Guild v. Chicago Housing Auth.,* 824 F.Supp. 808 (N.D.Ill.1993) (tenants third party beneficiaries); *accord Gomez v. Housing Auth. of City of El Paso,* 805 F.Supp. 1363 (W.D.Tex.1992), *aff'd* 20 F.3d 1169 (5th Cir.1994) (table); *Hurt v. Philadelphia Housing Auth.,* 806 F.Supp. 515 (E.D.Pa.1992); *Guild v. Chicago Housing Auth.,* 780 F.Supp. 511 (N.D.Ill.1991); *Tinsley v. Kemp,* 750 F.Supp, 1001 (W.D.Mo.1990); and *Concerned Tenants of Father Panik Village v. Pierce,* 685 F.Supp. 316 (D.Conn.1988)

not condone poor administration of federally regulated programs. We do, however, require proof of breach in order to hold in favor of an aggrieved litigant in a contract action. The Supreme Court's concluding comments in *Alpine Ridge* apply with equal force to this case:

> At bottom, many of respondent's arguments in support of the decision below seem to circle back to their vigorous contention that HUD's comparability studies have been poorly conceived and executed, resulting in faulty or misleading comparisons. But the integrity with which the agency has carried out its comparability studies is an entirely separate matter from its contractual authority to employ such studies at all. Even if it could be demonstrated that HUD's studies have been unreliable, this would in no way suggest that the contract forbids HUD from capping rents based on accurate and fair comparability studies. If respondents have been denied formula-based rent increases based on shoddy comparisons, their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons.

Alpine Ridge, 508 U.S. at 20-21, 113 S.Ct. at 1904.

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims is AFFIRMED.

Each party to bear its own costs.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

Before: MAYER, Chief Judge, RADER, Circuit Judge, and BRYSON, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on May 12, 1998.

FOR THE COURT,
JAN HORBALY, Clerk

Dated: May 5, 1998

by: /s/ ALEX VAN VEEN
ALEX VAN VEEN
Staff Law Clark

cc. ROBERT L. GORMAN
ARNOLD M. AUERHAN

PARK VILLAGE APTS v. US, 95-5101
(CFC - 701-88C)

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY 5, 1998

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

APPENDIX G

Section 8(c)(1) of the United States Housing Act of 1937 as amended by Public Law 93-383, Title II, Sec. 201(a), the Housing and Community Development Act of 1974, codified at 42 U.S.C. § 1437f(c)(1) (1974), provides:

> (c)(1) An assistance contract entered into pursuant to this section shall establish the maximum monthly rent (including utilities and all maintenance and management charges) which the owner is entitled to receive for each dwelling unit with respect to which such assistance payments are to be made. The maximum monthly rent shall not exceed by more than 10 per centum the fair market rental established by the Secretary periodically but not less than annually for existing or newly constructed rental dwelling units of various sizes and types in the market area suitable for occupancy by persons assisted under this section, except that the maximum monthly rent may exceed the fair market rental by more than 10 but not more than 20 per centum where the Secretary determines that special circumstances warrant such higher maximum rent or that such higher rent is necessary to the implementation of a local housing assistance plan as defined in section 213(a)(5) of the Housing and Community Development Act of 1974. Proposed fair market rentals for an area shall be published in the Federal Register . . .

APPENDIX H

Section 8(c)(2)(A) of the United States Housing Act of 1937 as amended by Public Law 93-383, Title II, Sec. 201(a), the Housing and Community Development Act of 1974, codified at 42 U.S.C. § 1437f(c)(2)(A) (1974), provides as follows:

> (c)(2)(A) The assistance contract shall provide for adjustment annually or more frequently in the maximum monthly rents for units covered by the contract to reflect changes in the fair market rentals established in the housing area for similar types and sizes of dwelling units or, if the Secretary determines, on the basis of a reasonable formula.

APPENDIX I

24 C.F.R. § 880.203(b) (revised as of April, 1977), provides as follows:

> (b) The adjusted monthly amount of the Contract Rent of a dwelling unit shall be determined by multiplying the Contract Rent in effect on the anniversary date of the Contract by the applicable Automatic Annual Adjustment Factor (see paragraph (a) of this section) and rounding the result to the next higher whole dollar amount.

APPENDIX J

UNITED STATES CODE

CONGRESSIONAL AND
ADMINISTRATIVE NEWS

93rd Congress — Second Session
1974

Convened January 21, 1974
Adjourned December 20, 1974

Volume 3

LEGISLATIVE HISTORY

HOUSING, COMMUNITY DEVELOPMENT
P.L. 93-383

HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

P.L. 93-383, see page 713

Senate Report (Banking, Housing and Urban Affairs Committee)
No. 93-693, Feb, 27, 1974 [To accompany S. 3066]

House Report (Banking and Currency Committee)
No. 93-1114,
June 17, 1974 [To accompany H.R. 1536]
House Conference Report No. 93-1279, August 12, 1974
[To accompany S. 3066]
Cong. Record Vol. 120 (1974)

DATES OF CONSIDERATION AND PASSAGE

Senate March 11, August 13, 1974
House June 20, August 15, 1974

The Senate bill was passed in lieu of the House bill. The Senate Report and the House Conference Report are set out.

SENATE REPORT NO. 93-693

The Committee on Banking, Housing and Urban Affairs, having considered the same, reports favorably a committee bill (S. 3066) to consolidate, simplify and improve laws relative to housing and housing assistance, to provide Federal assistance to local governments in support of community development activities, and for other purposes, and recommends that the bill do pass.

INTRODUCTION

The Committee bill reported herewith is an omnibus bill of 8 chapters covering a broad range of Federal housing and urban development programs. Although the main thrust of the proposed legislation is to consolidate and simplify existing programs, it contains authority for the development of several new programs, the most important of which is a new and far-reaching block grant community development program.

The consolidation provisions of the bill involve both housing and community development programs. The housing consolidation calls for a complete overhaul of legislation involving the FHA mortgage insurance programs and the low-rent public housing program. The former program goes back to 1934 when the National Housing Act authorized the Federal government insurance of mortgages, and the latter goes back to the United States Housing act of 1937 which provided the authority for the low-rent public housing program.

* * * * * *

Fair Market Rent and Housing Assistance Payments

The Section adds two new concepts to the leasing programs — housing assistance payments and fair market rents.

Under the housing assistance payment concept, the owner enters into a direct lease with the low income family, instead of the now common arrangement whereby the owner leases the unit to the public agency, which in turn subleases to the low income family. The lease specifies the rent for the unit, with provision for periodic adjustment in accordance with the provisions of Section 8, and provides for rental payment by the tenant in an amount not exceeding 25% of his adjusted income. The public housing agency enters into a housing assistance payment contract with the owner providing for the agency to make housing assistance payments to

the owner in an amount equal to the difference between the rent paid by the tenant and the rent payment specified in the lease, as adjusted from time to time. The rent specified in the lease may not exceed a maximum rent determined by the public housing agency or by HUD. The maximum rent is the fair market rent subject to limited adjustment based either on changes in an area's fair market rent or changes in operating expenses determined by a formula. HUD enters into an annual contributions contract with the agency providing for HUD payments to the agency in amounts necessary to meet the agency's housing assistance payment commitments.

Housing assistance payments may only be made in the following cases (1) while a unit is under lease for occupancy and occupied; or (2) for a period not to exceed sixty days while a unit under lease is vacant due to a breach by the tenant; or (3) for a period not to exceed sixty days if the public agency has not certified or submitted an eligible tenant, provided the owner is making good faith efforts to secure an eligible tenant.

Fair market rent is the rent determined by the Secretary based on a study of market rent in the area. For newly constructed units, fair market rents should take into account the cost of providing suitable amenities and sound architectural design. Because of additional facilities that are often required in housing of low income families, maximum rents may exceed fair market rents by 10% in the case of existing housing and by 20% in the case of newly constructed units.

Section 8(g)(3)(D) provides that fair market rentals will be increased or decreased pursuant to changes in the fair market rent in the area to the extent that such changes can be justified on the basis of actual expenses of owning and maintaining the dwelling units or on the basis of a reasonable formula determined by the Secretary.

* * * * * *

HOUSING, COMMUNITY DEVELOPMENT
P.L. 93-383

CONFERENCE REPORT NO. 93-1279

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and Senate on the disagreeing votes of the two Houses on the amendment of the House to the Senate bill (S. 3066) to consolidate, simplify, and improve laws relative to housing and housing assistance, to provide Federal assistance in support of community development activities, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect the action agreed upon by the managers and recommended in the accompanying conference report:

* * * * * *

Establishment of fair market rentals

The Senate bill required HUD to determine fair market rentals in each housing market area required to obtain adequately maintained and managed private existing and new rental housing; and on the basis of such determinations, public housing agencies or HUD would establish fair market rentals for assisted units. The House amendment required HUD to establish fair market rentals in each housing market area for new and existing units of various sizes and types suitable for occupancy for low-income families.

The conference report contains the House provisions. The conferees believe that the establishment of realistic fair market rentals will be a prime factor in the success or failure of the new housing assistance program. In establishing such

rentals, the HUD Secretary is expected to take into account factual data, analyses, and recommendations from community sources familiar with prevailing rents and costs in various market areas; and he should take into account the need to provide housing with suitable amenities and sound architectural design.

Maximum rent charged for any unit

The Senate bill provided that the maximum rent for existing units may exceed fair market rentals for such units by up to 10 percent, and for new or rehabilitated units by up to 20 percent, where determined necessary by a public housing agency or HUD. The House amendment provided that maximum rents may exceed fair market rentals by up to 10 percent generally and by up to 20 percent where HUD determined that special circumstances warrant such increases or that such increases are necessary for the implementation of local housing assistance plans. The conference report contains the House provisions. The conferees wish to express their intent that in establishing fair market rentals for existing unit HUD should use its authority to set rentals at 20 percent above fair market rentals only in exceptional cases.

Amount of subsidy

The Senate bill provided that the amount of subsidy with respect to any tenant could not exceed the difference between the rent charged and 25 percent of a tenant's *adjusted income,* with tenant incomes to be recertified every 2 years. The House amendment provided that the amount of subsidy would be equal to the difference between the rent charged and 15 to 25 percent of a tenant's *gross income* as defined by HUD, with tenant incomes to be recertified annually. The conference report contains the House provisions with an amendment requiring large families and other families with exceptional expenses to pay only 15 percent of their incomes toward rent.

APPENDIX K

Following are portions of HUD's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit with regard to *Rainier View Associates, et al. v. United States of America, Acting Through the Department of Housing and Urban Development,* 848 F.2d 988 (9th Cir. 1988); the Petition was dated March 1989:

The Section 8 new construction and substantial rehabilitation program provides federally subsidized housing to millions of low-income tenants. It is one of the largest housing programs administered by the United States Department of Housing and Urban Development (HUD), with a total of approximately $115 billion in projected federal subsidies due to project owners under existing standard form long-term contracts (known as "housing assistance payment contracts" or "HAP contracts"). Approximately 18,000 such contracts are in effect nationwide, and all are subject to the statutory and implementing contractual language whose construction is the subject of this case.

* * * * * *

The Ninth Circuit has converted a program designed to attract landlords by assuring them that they will receive full market rents into a program in which landlords would receive formula-based rents that have been determined to *exceed* market rents, all because of a perceived — but in fact nonexistent — inconsistency between HUD's decision to use a formula to set presumptive rent increases for projects in large areas and its use of individualized comparability studies to cap those increases when such studies reveal that the formula would produce above-market rent levels.

* * * * * *

By contrast, a comparability study compares one assisted housing project with one to five individual housing projects that have similar unassisted units in the same local area.

That is done because, for units to be truly comparable for rent-level purposes, they must be located in close proximity to each other (since even small distances between projects may vastly alter their rental value), and must be as similar to each other in all other relevant aspects as possible. See *1984 Hearing, supra,* at 66-67.

APPENDIX L

Following are portions of HUD's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit with regard to *Alpine Ridge Group v. Jack Kemp, Secretary of HUD,* 955 F.2d 1382 (9th Cir. 1992); the Petition was dated September, 1992:

Under the Section 8 program, the Secretary of the United States Department of Housing and Urban Development (HUD) enters into standard form long-term contracts with project developers and landlords. These are known as "housing assistance payment contracts" or HAP contracts. The framework for those contracts is governed by statute. Under the statute, a maximum monthly rent is established for each dwelling unit, which (subject to exceptions not relevant here) cannot exceed a "fair market rental [ ]." 42 U.S.C. 1437f(c)(1).

* * * * * *

Similarly, Section 801 is a valid instance of "curative" legislation. It is rationally designed to restore a proper basis for adjusting rents in the Section 8 program after that basis was upset by the unexpected decision in *Rainier View.* See note 4, *supra.* The Section 8 landlords long knew of HUD's position that comparability studies were permissible, and were well aware from the Housing and Community Development Act of 1987 that Congress shared that view. In addition, the Section 8 landlords can assert no equities against modification of a contract that, as interpreted by the Ninth Circuit, gives then the right to *above*-market rents; they knowingly entered into a program that was designed simply to provide prevailing market rents. See S. Rep. No. 693, 93d Cong., 2d Sess. 45-46 (1974).

* * * * * *

Section 801 adjusts the payment provisions in a comprehensively regulated low-income housing program to ensure

that the developers do not reap non-market justified gains. It restores what Congress has always made clear is the basis of the program — prevailing market rents — and fine tunes the methodology for achieving the program's ends.

APPENDIX M

Following are portions of HUD's brief on the merits on its Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit with regard to *Alpine Ridge Group v. Jack Kemp, Secretary of HUD*, 955 F.2d 1382 (9th Cir. 1992); HUD's brief was dated January, 1983:

In 1974, Congress added the Section 8 program to the United States Housing Act of 1937 (Act). See 42 U.S.C. 1437f. The Section 8 program provides federally subsidized housing to millions of low income tenants by authorizing, *inter alia,* the payment of rent subsidies to private owners and developers of low-income housing. The tenant's rental obligation is based on his ability to pay, while the federal government makes "assistance payments" to the project owner to bring the owner's total rental income up to the prevailing market level. See generally 42 U.S.C. 1437a(a), 1437f(b) and (c).

* * * * * *

The comparability studies, in contrast, focus on three to five units comparable to a particular project in a relevant geographic area; they do not establish a rent level for a general area.

* * * * * *

Section 8 projects owners retain their rights to (1) payment of the "lion's share" of rent by the government on behalf of project residents; (2) rent adjustments that preserve the initial difference between the contract rent and market rates when the contract was signed; (3) rent adjustments to reflect tax, utility, or other costs not adequately covered by market-based adjustments; and (4) assurances that the contract rent "will never drop below the original fixed rate." *Sheridan Square Partnership,* 761 F. Supp. at 746; 42 U.S.C. 1437f(c). All of those contract benefits and

protections against market risk are left unaffected by Section 801.

* * * * * *

Under those principles, Congress's enactment of Section 801 is constitutional. The statute is neither arbitrary nor irrational in light of Congress's purpose to respond to *Rainier View* by reinstating the market-rent approach of the Section 8 program.